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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSHUA D. BAKER,
Petitioner,

v.

ERIC CHISOM, DREW COUNTY DEPUTY SHERIFF, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND MARCIA BRUNER, DREW COUNTY DEPUTY SHERIFF, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a complaint does not specify that a defendant is being sued in her individual capacity, but the course of the proceedings establishes the plaintiff's intent to hold the defendant personally liable, must the complaint nonetheless be construed to name the defendant only in her official capacity?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joshua D. Baker respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1a-14a) is published at 501 F.3d 920. The district court's opinion holding that respondents had originally been sued only in their official capacity and that petitioner's individual capacity claims against them were thus time-barred (Pet. App. 15a-26a) is unpublished. The order of the court of appeals denying rehearing and rehearing en banc (*id.* 28a-29a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 2007. The order of the court of appeals denying rehearing en banc was entered on October 5, 2007. Justice Alito subsequently extended the time to file this petition to and including February 15, 2008. App. No. 07A512. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS AND RULES

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

> be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Federal Rule of Civil Procedure 8(a)(2) provides, in relevant part: "A pleading that states a claim for relief must contain . . .(2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."

Federal Rule of Civil Procedure 9(a)(1)(A) provides, in relevant part: "Except when required to show that the court has jurisdiction, a pleading need not allege: (A) a party's capacity to sue or be sued . . . ."

STATEMENT

While petitioner Joshua Baker was at the Drew County, Arkansas detention facility being processed for traffic violations, he was handcuffed to a concrete bench by respondent Marcia Bruner, and then choked and shocked with a taser by respondent Eric Chisom. He brought suit against respondents under 42 U.S.C. § 1983, seeking compensatory and punitive damages. The courts below held that his suit was time-barred because his original complaint did not comply with an Eighth Circuit requirement that complaints in § 1983 suits contain an unambiguous statement that the plaintiff has named the governmental defendant in his individual capacity. A member of the panel concurred in the judgment, noting that the Eighth Circuit rule

conflicts with that applied by the "overwhelming majority" of other courts of appeals. This Court should grant certiorari to resolve this deep, persistent, and intractable conflict among the circuits.

1. Section 1983 provides a remedy for individuals whose constitutional rights have been violated by a "person" acting under color of state law. When the defendant in a § 1983 damages action is a natural person,[1] there are two distinct capacities in which he might face suit. In her *personal* capacity, a defendant faces liability for both compensatory and punitive damages, *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Smith v. Wade*, 461 U.S. 30, 35 (1985); she also has available the defense of qualified immunity from suit unless she violated a clearly established constitutional right, *Hafer v. Melo*, 502 U.S. 21, 25 (1991). By contrast, when a defendant is sued in her *official* capacity, the lawsuit will be treated as if it had been brought against the government. *Graham*, 473 U.S. at 165-66. A municipal-level official (such as the respondents here), while she cannot invoke qualified immunity in an official-capacity suit, will face liability only if she acted pursuant to municipal policy under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), and she will be liable only for compensatory, and not for punitive damages.[2]

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[1] Since this Court's decision in *Monell*, the word "person" in § 1983 has been construed to extend to sub-state-level governmental entities as well as natural persons.

[2] With respect to state-level officials, if they are sued in their official capacity, they will be entitled to raise the defenses available to the state, including immunity from suit under the Eleventh Amendment. *Graham*, 473 U.S. at 167.

2. On the morning of August 15, 2002, officers in Drew County, Arkansas arrested petitioner Joshua Baker for traffic violations. After petitioner was transferred to the county's detention facility for processing, respondent Marcia Bruner, a Drew County Deputy Sheriff, handcuffed petitioner to a concrete bench pending the arrival of the arresting officer. While respondent Bruner looked on, respondent Eric Chisom – also a Drew County Deputy Sheriff – choked petitioner and shocked him with a taser to the back of his head. Respondent Chisom's actions were captured on videotape by the detention facility. He was subsequently convicted of third-degree battery. Pet. App. 1a.

Less than a year later, on June 24, 2003, petitioner filed a 42 U.S.C. § 1983 suit against respondents, as well as Drew County Sheriff LaRon Meeks, and nine members of the Drew County Quorum Court.[3] Pet. App. 30a-35a. The caption of petitioner's complaint identified Sheriff Meeks and the members of the Quorum Court as defendants in both their individual and official capacities. *Id.* 30a. The caption did not specify the capacity in which Bruner and Chisom (respondents here) were sued. *Id.* The body of the complaint, however, described them "as individual [d]efendants," *id.* 31a, and sought punitive damages against all the defendants, *id.* 35a.

Defendants jointly moved for summary judgment. Pet. App. 18a. Petitioner responded with a motion for a voluntary non-suit. *Id.* With respect to respondents, the district court granted petitioner's motion,

[3] In Arkansas, a quorum court is a part-time legislative body with overall responsibility for a county's affairs.

dismissing petitioner's claims against them without prejudice. *Id.* 19a. (The district court granted the other defendants' motion for summary judgment, and accordingly entered judgment against petitioner on the claims against them. *Id.* 18a.).

2. On September 22, 2005, petitioner filed a second complaint (which gives rise to this petition for certiorari) against respondents in both their official and individual capacities. *See* Pet. App. 19a.

Under Arkansas law, which governs this case, the statute of limitations for § 1983 claims is three years. *See* Pet. App. 2a (citing *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991)).[4] Arkansas law also contains a "savings" statute, which permits timely non-suited claims to be refiled within one year. *Id.* (citing Ark. Code Ann. § 16-56-126).

Notwithstanding that petitioner's complaint was filed within one year of his non-suit, respondents moved to dismiss the individual-capacity claims against them as outside the statute of limitations because they claimed that petitioner's first suit had not been brought against them in their individual capacities. Pet. App. 19a. Respondents pointed to Eighth Circuit case law providing that civil rights actions are deemed to be solely official-capacity suits unless the plaintiff expressly states otherwise. *E.g.*, *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (1999). Thus, respondents reasoned, the filing date for the complaint in this case could not relate back to the

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[4] Under *Wilson v. Garcia*, 471 U.S. 261 (1985), the statute of limitations for a § 1983 claim is the personal-injury statute of limitations for the state in which the case is brought. *Id.* at 275.

2003 complaint. The district court agreed, reasoning that petitioner's original complaint had not specifically stated that respondents were sued in both their official and individual capacities. Pet. App. 20a-21a.[5]

3. On appeal, the Eighth Circuit affirmed. Citing circuit precedent requiring an express statement for officials to be sued in their individual capacity for Section 1983 claims, the panel found it dispositive that "[t]he caption was silent as to the capacities in which [respondents] were named," while (in the panel's view) the body of the complaint "contained . . . only allegations that were, at most, 'cryptic hints.'" Pet. App. 5a-6a. The panel accordingly rejected petitioner's argument that his first complaint had adequately named respondents in their individual capacities because it referred to them as "individual defendants" and sought punitive damages, which could not have been recovered in a suit against them in their official capacity. *Id.*

Judge Gruender concurred separately. He agreed that the Eighth Circuit's "current precedent mandate[d]" affirmance. Pet. App. 10a. He nonetheless wrote separately to express his concern that what was once a "judicially-created suggestion that 'section 1983 litigants wishing to sue government agents in both capacities should simply use the following language: "Plaintiff sues each and all defendants in both their individual and official capacities"'" had "mutated into a bright-line presumption that '[i]f a plaintiff's complaint is silent

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[5] The court separately granted respondents summary judgment as to their liability in their official capacity. Pet. App. 25a. That decision is not before this Court.

about the capacity in which she is suing the defendant, we interpret the complaint as including only official-capacity claims.'" *Id.* 10a (citation omitted). Such a presumption, Judge Gruender explained, had arisen in cases involving state-level officials, who are "arguably entitled to an Eleventh Amendment immunity defense," to ensure that jurisdiction was present; that presumption should not, he continued, necessarily extend to cases involving county or municipal-level officials, in which immunity under the Eleventh Amendment is not at issue. Pet. App. 11a (citing *Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir. 1995)). Indeed, he pointed out, not only do the "overwhelming majority of our sister circuits uniformly take a different approach to capacity-pleading issues," *id.* 12a (citing decisions of nine circuits), but the Eighth Circuit's rule also "seem[ed] to be swimming against recent currents from the Supreme Court regarding notice pleading," *id.*

4. Petitioner sought rehearing and rehearing en banc, which was denied by a divided vote. Pet. App. 28a-29a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Intractably Divided on this Important and Recurring Question.

As this Court and the courts of appeals have recognized, the circuits are divided on the question of what legal standard governs whether a Section 1983 defendant has been named in her individual capacity, a designation that has significant consequences for the elements of a plaintiff's case and the scope of the

defendant's potential liability. In *Hafer v. Melo*, this Court noted that the Third Circuit in that case, applying the same rule as "[s]everal other Courts of Appeals," had "looked to the proceedings below to determine whether [the plaintiffs] brought their claims for damages against [the defendant] in her official capacity or her personal capacity," while other circuits "apply a more rigid pleading requirement." 502 U.S. 21, 24 n.* (1991) (citing, *e.g.*, *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989)). The Court, however, did not resolve the conflict because the issue was "not properly before [it]." *Id.* *See also, e.g.*, *Powell v. Alexander*, 391 F.3d 1, 21-23 (1st Cir. 2004) (recognizing the conflict); *Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir. 1995) (same). Since *Hafer*, numerous courts of appeals have considered the question; several of those that originally appeared to apply a stringent pleading requirement have reassessed or clarified their position; and yet a third competing approach has emerged. Now, only the Eighth Circuit – in conflict with *eleven* other courts of appeals – applies a bright-line requirement that a plaintiff expressly name a defendant in her individual capacity. As the denial of rehearing en banc in this case illustrates, that court has steadfastly adhered to its outlier position. Certiorari is warranted to resolve the three-way circuit conflict.

1. In holding that petitioner had named respondents as defendants only in their official capacities because his complaint did not contain an express statement that he was suing them in their individual capacities, the Eighth Circuit applied a *per se* rule that dates back at least thirteen years to its decision in *Egerdahl v. Hibbing Community College*,

72 F.3d 615, 619-20 (1995). In that case, "the caption and body of [the plaintiff's] complaint referred to [the defendants] by name rather than by official position" and, in responding to the defendants' motions to dismiss, the plaintiff "asked the District Court to construe her amended complaint as seeking damages from the defendants in their personal capacities." *Id.* Nevertheless, the court of appeals rejected her claim that the defendants had had "ample notice" of her intent to hold them personally liable. Circuit precedent, the panel explained, "requires that a plaintiff's complaint contain a clear statement of her wish to sue defendants in their personal capacities. Neither a cryptic hint in a plaintiff's complaint nor a statement made in response to a motion to dismiss is sufficient." *Id.* at 620 (citing *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989)).

Even while acknowledging that other circuits would apply a different and more holistic inquiry, the Eighth Circuit has repeatedly adhered to this rule, deeming itself bound by circuit precedent. *See, e.g.*, *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997) (noting that "other circuits have adopted a more lenient pleading rule," but applying clear statement rule and explaining that it was "bound by *Egerdahl* and *Nix*"); *Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178, 1182 (1998); *Rumery v. Outboard Marine Corp.*, 172 F.3d 531, 535 (1999). Accordingly, district courts within the circuit have applied this *per se* rule. *See, e.g.*, *infra* note 14 (listing recent district court cases). Moreover, and as Judge Gruender noted in his separate opinion in this case, *see* Pet. App. 11a-12a, although the Eighth Circuit's original justification for the rule arose in part from its view that a clear

statement of capacity is required to demonstrate jurisdiction in cases involving the Eleventh Amendment, *see, e.g.*, *Nix*, 879 F.2d at 431; *Murphy*, 127 F.3d at 755, the Eighth Circuit has subsequently extended that rule to cases, such as this one, that do not implicate state sovereignty in any respect.[6]

By contrast, the First, Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh, and District of Columbia Circuits all reject the requirement of an explicit pleading rule. Instead, they use a "course of proceedings" test that looks to the totality of the circumstances to determine whether the defendant had notice that she faced individual liability in her personal capacity. *See Powell*, 391 F.3d at 22 (declining "to adopt a formalistic bright-line test requiring a plaintiff to use specific words in his or her complaint," "join[ing] the multitude of circuits employing the 'course of proceedings' test," and emphasizing that "the central inquiry remains whether the course of proceedings here gave [the defendant] fair notice that she was being sued in her individual capacity and was subject to personal liability for punitive damages"); *Yorktown Med. Lab., Inc. v. Perales*, 948 F.2d 84, 88-89 (2d Cir. 1991) ("In place of express pleading, we look to the totality of the complaint as well as the course of proceedings to determine whether the defendants were provided with sufficient notice of potential exposure to personal liability."); *Melo v. Hafer*, 912 F.2d 628, 635, 636 n.7 (3d Cir. 1990) (noting that "[i]n determining whether

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[6] *See also, e.g.*, *Andrus ex rel. Andrus v. Arkansas*, 197 F.3d 953, 955 (8th Cir. 1999); *Artis v. Francis Howell North Band Booster Ass'n*, 161 F.3d 1178, 1182 (8th Cir. 1998); *Rollins v. Farmer*, 731 F.2d 533, 536 n.3 (8th Cir. 1984).

plaintiffs sued Hafer in her personal capacity, official capacity, or both, we first look to the complaints and the 'course of proceedings'" and adding that the key inquiry is whether a "defendant being sued in his or her personal capacity . . . [is] given adequate notice that his or her personal assets are at stake"), *aff'd on other grounds*, *Hafer v. Melo*, 502 U.S. 21 (1991); *Biggs v. Meadows*, 66 F.3d 56, 60-61 (4th Cir. 1995) (holding that a "plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983" and adopting "course of proceedings" test instead); *United States ex rel. Adrian v. Regents of the University of California*, 363 F.3d 398, 402 (5th Cir. 2004) (relying on course of proceedings test when it was "unclear whether the first amended complaint named the [defendants] in their official or in their personal capacities"); *Moore v. City of Harriman*, 272 F.3d 769, 773 (6th Cir. 2001) (en banc) ("When a § 1983 plaintiff fails to affirmatively plead capacity in the complaint, we then look to the course of proceedings to determine whether [the] concern [that defendants receive adequate] notice has been satisfied."), *cert. denied sub nom. McBroom v. Moore*, 536 U.S. 922 (2002);[7] *Daskalea v. District of Columbia*, 227 F.3d 433, 448 (D.C. Cir. 2000) (holding that "this circuit has joined those of its sisters that employ the 'course of proceedings' approach," although ultimately concluding that "the course of proceedings in this case

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[7] Although this Court in *Hafer*, *supra*, classified the Sixth Circuit as employing the same per se approach as the Eighth Circuit in this case, the Sixth Circuit subsequently made clear that it has "never applied such a strict interpretation," and that it instead applies the "course of proceedings" test "to determine whether § 1983 defendants have received notice of the plaintiff's intent to hold them personally liable," *Moore*, 272 F.3d at 772.

neither put [a defendant] on notice that she was being sued in her individual capacity[] nor evidenced her understanding that her personal liability was at stake"); *Pride v. Does*, 997 F.2d 712, 715 (10th Cir. 1993) ("[W]here the complaint fails to specify the capacity in which the government official is sued, we look to the substance of the pleadings and the course of the proceedings in order to determine whether the suit is for individual or official liability."); *Jackson v. Georgia Dep't of Transportation*, 16 F.3d 1573, 1575 (11th Cir.) ("When it is not clear in which capacity the defendants are sued, the course of proceedings typically indicates the nature of the liability sought to be imposed."), *cert. denied*, 513 U.S. 929 (1994).

For their part, the Seventh and Ninth Circuits have also rejected the Eighth Circuit bright-line rule requiring an express statement that a defendant is being sued in her individual capacity. Although the Seventh Circuit does not label its approach a "course of proceedings" test, that court looks at the entirety of the complaint and the "nature of the conduct alleged": if "the complaint alleges the tortious conduct of an individual acting under color of state law, an individual capacity suit plainly lies, even if the plaintiff failed to spell out the defendant's capacity in the complaint." *Hill v. Shelander*, 924 F.2d 1370, 1374 (1991). *Hill* involved facts quite similar to this case: a Section 1983 damages lawsuit against a prison guard who injured the plaintiff by (among other things) slamming his head into metal bars and kicking him in the testicles. In contrast to the Eighth Circuit's approach here, the Seventh Circuit held that the guard was being sued in his individual capacity despite the plaintiff's failure to so specify. *Id.* The

court of appeals reasoned that the plaintiff's "complaint[,] when 'read in its entirety[,]' plainly shows that an individual capacity suit was intended," as the plaintiff sought punitive damages and the allegedly unconstitutional conduct at issue involved only the guard's actions. *Id.* And in *Miller v. Smith*, 220 F.3d 491, 494 (7th Cir. 2000), the court of appeals held that the plaintiff had brought an individual-capacity suit, reasoning that the plaintiff had sought damages, the allegations involved individual torts, and the defendants had raised a qualified immunity defense.

Similarly, the Ninth Circuit – like the courts of appeals that use the "course of proceedings" test – considers "the 'basis of the claims asserted and nature of relief sought.'" *Price v. Akaka*, 928 F.2d 824, 828 (1990), *cert. denied*, 502 U.S. 967 (1991). However, that court goes even further, presuming that government officials have been sued in their individual capacity when they are named in a complaint that seeks damages under Section 1983. *Id.*; *see also Cerrato v. San Francisco Community College District*, 26 F.3d 968, 973 n.16 (9th Cir. 1994) ("[W]e have held that a section 1983 suit against state actors necessarily implies a suit against the defendants in their personal capacities."). That court reasons that "[a]ny other construction would be illogical where the complaint is silent as to capacity, since a claim for damages against state officials in their official capacities is plainly barred." *Shoshone-Bannock Tribes v. Fish & Game Commission, Idaho*, 42 F.3d 1278, 1284 (1994).

2. Certiorari is warranted because only this Court can resolve this three-way circuit conflict. The Eighth Circuit has applied its bright-line presumption for nearly fifteen years, during which it has acknowledged the contrary holdings of the other circuits but nonetheless adhered to its precedent mandating use of the clear statement rule. *See supra* at 9. Indeed, in this very case, Judge Gruender explicitly questioned the validity of the circuit's clear statement rule and emphasized that "the overwhelming majority of [the Eighth Circuit's] sister courts uniformly take a different approach to capacity pleading issues." Pet. App. 12a. The panel responded only that such an argument should instead be addressed to the en banc court, *id.* 6a n.2, which subsequently denied review, *id.* 28a-29a. In light of the Eighth Circuit's intransigence on this question, then, the treatment of Section 1983 plaintiffs will remain forever balkanized absent this Court's intervention.

3. This case presented an ideal vehicle for resolving the circuit split. The issue was squarely presented below and is outcome determinative for petitioner, whose lawsuit was dismissed solely because the courts below treated his original complaint as having sued respondents in only their official capacities – a result that no other circuit would have reached.

Courts applying the "course of proceedings" approach would find that petitioner's original complaint sued respondents in their individual capacities. First, the body of the original complaint indicated petitioner's intent to hold respondents

personally liable. Petitioner named respondents "as individual Defendants." Pet. App. 31a. He also sought punitive damages, *id.* 35a, which would not have been available had he been suing respondents only in their official capacities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-60 (1981). Finally, he sought to hold all of the defendants (including respondents) jointly and severally liable. *Id.* 35a. Because respondents were both employees of the same county agency, joint and several liability would make no sense in an official capacity suit, since it would be the equivalent of holding the Drew County Sheriff's Department jointly and severally liable with itself.

In light of these considerations, courts applying the course of proceedings test recognize that a request for punitive damages can provide notice to an official that he or she is being sued in her individual capacity, *see Powell*, 391 F.3d at 23.[8] Similarly, a complaint that seeks to hold the defendants jointly and severally liable supports an intention to sue an official in his or her personal capacity because such a pleading would "make[] little sense in a damages action against an officer in his official capacity given that such a suit is equivalent to a suit directly against the municipality."

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[8] *See also Moore*, 272 F.3d at 772 n.1; *Biggs*, 66 F.3d at 61 ("Another indication that suit has been brought against a state actor personally may be a plaintiff's request for compensatory or punitive damages, since such relief is unavailable in official capacity suits."); *Does*, 997 F.2d at 715 (finding that a plaintiff's prayer "for punitive damages, which are not available against the state," suggested that the claim was in fact against the official in her individual capacity).

Atchinson v. District of Columbia, 73 F.3d 418, 425 (D.C. Cir. 1996).[9]

Second, petitioner's claims against respondents were grounded in their individual wrongdoing – their decision to choke and taser him – rather than ministerial implementation of a municipal custom or policy that would underlie an official-capacity action. Courts applying the course of proceedings test reason that allegations of individual wrongdoing by the defendant identify potential personal liability, while official capacity suits – which are equivalent to a suit against "an entity of which an officer is an agent," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 n.55 (1978) – require a plaintiff to show that the defendant was in fact executing or acting pursuant to the government's policy or custom. *Id.* at 694. *E.g.*, *Biggs*, 66 F.3d at 61 (suggesting that both individual allegations and a reference in a complaint to a seminal case on the constitutionality of individual officer actions can give notice of individual liability); *Powell*, 391 F.3d at 24 (noting that the complaint did not seek to show the official acted according to a governmental policy or custom "as would be expected in an official-capacity suit").

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[9] *See also Daskalea*, 227 F.3d at 448 (finding that the complaint did not provide notice of personal liability in part because the complaint did not "seek to hold the defendants jointly and severally liable, a formulation that might have given some indication of an intention to sue [the official] in her personal capacity"); *Jackson*, 16 F.3d at 1576 (finding that the complaint included an individual-capacity suit against employees of a state agency in part because it sought to hold both the agency and the employees jointly and severally liable).

Third, the remaining proceedings in the case confirm that respondents understood that they had been sued in both their official and their individual capacities. Respondents explicitly filed their motion for an extension of time to answer the complaint "in both their individual and official capacities." Pet. App. 36a. Respondents also subsequently asserted a qualified immunity defense in their answers, *id.* 41a, 45a, and in their motion for summary judgment. Defs. Mot. for Summary Judg. at 2 (filed Aug. 25, 2004) (E.D. Ark. No. 5-03-CV-00238). Courts employing the "course of proceedings" test consider whether events that occurred after the filing of the initial complaint reflect the defendants' awareness that they have been sued in their individual capacity. *Moore*, 272 F.3d at 772 n.1. Thus, for example, a defendant's assertion of a qualified immunity defense indicates that the defendant understood the plaintiff's action as an individual-capacity suit. *Biggs*, 66 F.3d at 23.[10]

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[10] *See also Powell*, 391 F.3d at 22 (reasoning that the nature of the defenses raised in response to the complaint, particularly the defense of qualified immunity, is relevant to determining whether the official had notice of potential personal liability); *Moore*, 272 F.3d at 772 n.1 (course of proceedings test considers "the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability."); *Daskalea*, 227 F.3d at 449 (finding that the defendant official lacked notice under the course of proceedings test, citing the fact that the official never raised the defense of qualified immunity); *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987) ("The raising, litigation, and submission to the jury of the qualified immunity defense as a defense that would preclude liability on the section 1983 claim demonstrates, however, that the section 1983 claim was actually tried as a claim against the deputies solely in their individual capacities.").

Moreover, because the course of the proceedings reflects petitioner's intent to hold respondents personally liable, the majority of circuits would find that petitioner filed his original complaint against respondents in their individual capacities notwithstanding that the caption of the complaint expressly named the other county officials as defendants in both their individual and official capacities while making no express indication either way about the capacity in which respondents were being sued. Such a specification was necessary to make clear that petitioner sought to hold the *other* county officials liable in their individual capacities as well – an inference that could not otherwise be drawn because those defendants were not directly involved in the choking and tasering of petitioner.[11]

The Seventh and Ninth Circuits would also construe petitioner's suit against respondents as one brought against them in their individual capacities. The Seventh Circuit would deem dispositive the fact that petitioner's complaint "allege[d] tortious conduct of [respondents] acting under color of state law," rather than "seek[ing] injunctive relief from official policies or customs." *Miller*, 220 F.3d at 494. And for its part, the Ninth Circuit would rely on its

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[11] Respondents did not seriously argue below that the course of proceedings, when viewed in their entirety, would lead to a determination that petitioner's claims against respondents were in their official capacities only. Respondents instead maintained that petitioner simply failed to conform to the Eighth Circuit's pleading rule: he "did not sue [respondents] in their individual capacities in the original action as a matter of law" because he "failed to clearly . . . and unambiguously name [respondents] in their individual capacities in the original action." Resps. C.A. Br. 14.

presumption that government officials are sued in their individual capacity when they are named in a complaint that seeks damages under Section 1983.[12]

4. Review is also warranted because the legal question over which the courts of appeals are divided arises frequently. *See* Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.1 (4th ed. 2007 Supp.) (noting that between 40,000 and 50,000 Section 1983 claims are brought each year). While it is true that it would be "clearly preferable that plaintiffs explicitly state whether a defendant is sued in his or her 'individual capacity,'" *Moore*, 272 F.3d at 772, a large proportion of these complaints are filed either by inexperienced counsel or by *pro se* plaintiffs, who may be unaware of both the Eighth Circuit's longstanding rule (particularly when the rule is so crucially different from the rule applied in all the other circuits to have considered the question) and that court's admonition that "section 1983 litigants wishing to sue government agents in both capacities should simply use" the language that it has prescribed, *see Nix v. Norman*, 879 F.2d 429 (1989). For example,

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[12] To be sure, the Ninth Circuit in *Shoshone* held that when the plaintiffs "specified . . . that one of the state officials . . . was being sued in both his individual and official capacities, while neglecting to specify in what capacity the remaining officials were named," the remaining officials were sued in their official capacities only. 42 F.3d at 1285. However, the court in *Shoshone* rested its holding on the premise that the officials not explicitly named in the caption in their individual capacities "could assume that they were *not* being sued in their individual capacities." *Id.* In this case, by contrast, there can be no such assumption: not only did the body of petitioner's complaint name respondents as "individual defendants" and seek punitive damages, but respondents initially appeared in both capacities and asserted a qualified immunity defense.

approximately half of all civil rights suits are filed by prisoners, ninety-six percent of whom file *pro se*. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 475 (2002). Construing these plaintiffs' complaints as suing defendants only in their official capacities unless the plaintiffs expressly plead individual capacity may preclude many plaintiffs from obtaining redress for violations of their constitutional rights even when – as here – the complaint and the subsequent proceedings nonetheless reflect the plaintiff's intent to hold a defendant liable in her individual capacity. Indeed, that the Eighth Circuit's per se rule does indeed serve as a trap for unwary civil rights litigants, *cf. Slack v. McDaniel*, 529 U.S. 473, 487 (2000), can be seen in the myriad decisions by district courts in that circuit which rely on the rule to find that a plaintiff has sued a governmental defendant solely in her official capacity, only to then dismiss the case based either on immunity under the Eleventh Amendment or because the plaintiff has failed to allege a government policy or custom responsible for the alleged constitutional violation.[13] Such a result is directly contrary to Congress's purpose in enacting Section 1983 – *viz.*, to "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

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[13] *See, e.g., Hill v. Moss*, No. 4:07CV1589 RWS, 2007 WL 4593501 (E.D. Mo. Dec. 28, 2007); *Carter v. Wright*, No. 2:07CV00048 DDN, 2007 WL 4554009 (E.D. Mo. Dec. 19, 2007); *Hebron v. Simpson*, No. 4:07CV1349 CDP, 2007 WL 3311290 (E.D. Mo. Nov. 5, 2007).

The question presented is also frequently recurring. Not only have twelve circuits addressed this issue, *see supra* Part I, but most of those circuits have done so repeatedly. For example, during an eleven-year period, the Sixth Circuit alone issued over two hundred unpublished opinions addressing the capacity in which defendants had been sued. *See Moore*, 272 F.3d at 780-89 (Suhrheinrich, J., dissenting). The issue also arises frequently at the district court level. In the Eighth Circuit, for example, district courts issued over three dozen opinions addressing the capacity issue in 2007,[14] while district

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[14] *Hill v. Singer*, No. 4:07CV1591 JCH, 2007 WL 4615955 (E.D. Mo. Dec. 31, 2007); *Hill v. Moss*, No. 4:07CV1589 RWS, 2007 WL 4593501 (E.D. Mo. Dec. 28, 2007); *Hood v. Blake*, No. 4:07CV992 HEA, 2007 WL 4593503 (E.D. Mo. Dec. 28, 2007); *Krupp v. Stubblefield*, No. 4:07CV1862 TIA, 2007 WL 4565023 (E.D. Mo. Dec. 21, 2007); *Morgan v. Dep't of Mental Health*, No. 4:07CV1784 DJS, 2007 WL 4565025 (E.D. Mo. Dec. 21, 2007); *Carter v. Wright*, No. 2:07CV00048 DDN, 2007 WL 4554009 (E.D. Mo. Dec. 19, 2007); *Fisher v. Goynes*, No. 8:07CV378, 2007 WL 4458918 (D. Neb. Dec. 14, 2007); *Chaney v. Somogye*, No. 4:07CV1624 CEJ, 2007 WL 3377004 (E.D. Mo. Nov. 13, 2007); *Jones v. Brayer*, No. 4:07CV1704 RWS, 2007 WL 3353925 (E.D. Mo. Nov. 9, 2007); *McClure v. Rehg*, No. 4:07CV1686 FRB, 2007 WL 3352389 (E.D. Mo. Nov. 8, 2007); *Hebron v. Simpson*, No. 4:07CV1349 CDP, 2007 WL 3311290 (E.D. Mo. Nov. 5, 2007); *Motton v. Lancaster County Corrections*, No. 4:07CV3090, 2007 WL 3333836 (D. Neb. Nov. 5, 2007); *Neal v. Sikeston Dep't of Safety*, No. 1:07CV129 LMB, 2007 WL 3310712 (E.D. Mo. Nov. 5, 2007); *Seltzer v. Bryson*, No. 4:07CV1665 ERW, 2007 WL 3268430 (E.D. Mo. Nov. 2, 2007); *Stainbrook v. Houston*, No. 4:07CV3196, 2007 WL 3244086 (D. Neb. Nov. 1, 2007); *Richardson v. Blake*, No. 4:07CV1089SNL, 2007 WL 3232231 (E.D. Mo. Oct. 30, 2007); *Smith v. Rowley*, No. 2:05-CV-13 (JCH), 2007 WL 3232229 (E.D. Mo. Oct. 30, 2007); *McCord v. Blake*, No. 4:07CV01313 ERW, 2007 WL 3146567 (E.D. Mo. Oct. 25, 2007); *Rulo v. Washington County Jail*, No. 4:07CV1343 HEA, 2007 WL 3146571 (E.D. Mo. Oct. 25, 2007); *Candler v. Nobles*, No. 1:07CV0003 1JL, 2007 WL

courts in the Sixth Circuit issued at least fourteen such opinions in 2006 and 2007.[15]

3125108 (E.D. Ark. Oct. 23, 2007); *Gerber v. Englehart*, No. 4:07CV1228 CEJ, 2007 WL 3119849 (E.D. Mo. Oct. 23, 2007); *Everetts v. Farmington Treatment Ctr.*, No. 4:07CV1056 JCH, 2007 WL 3028192 (E.D. Mo. Oct. 15, 2007); *Ahmed v. Fenesis*, Civ. No. 05-2388 (JRT/FLN), 2007 WL 2746842 (D. Minn. Sept. 19, 2007); *Hoyt v. Mullins*, Civ. No. 06-5115, 2007 WL 2681104 (W.D. Ark. Sept. 12, 2007); *Estes v. Lederle*, No. 4:07 CV 274 DDN, 2007 WL 2693823 (E.D. Mo. Sept. 10, 2007); *Royster v. Darling*, Civ. No. 05-947 (RHK/AJB), 2007 WL 2669466 (D. Minn. Sept. 6, 2007); *Randle v. City of Minneapolis Police Dep't*, Civ. No. 06-859 (PAM/RLE), 2007 WL 2580568 (D. Minn. Sept. 5, 2007); *Skinner v. New Madrid County, Missouri*, No. 1:07CV0097 LMB, 2007 WL 2361939 (E.D. Mo. Aug. 15, 2007); *Hardy v. Wheeler*, Civ. No. 07-2590 (MJD/RLE), 2007 WL 2026408 (D. Minn. July 9, 2007); *Patten v. Warren County Jail*, No. 4:07 CV 1127 RWS, 2007 WL 1876473 (E.D. Mo. June 28, 2007); *Zessin v. Moore*, No. 8:07CV171, 2007 WL 1825175 (D. Neb. June 22, 2007); *Wilson v. Nixon*, No. 4:07CV1055 ERW, 2007 WL 1725291 (E.D. Mo. June 12, 2007); *Ely v. Bowers*, No. 4:07CV961 AGF, 2007 WL 1577538 (E.D. Mo. May 31, 2007); *Fowler v. Arkansas State Hosp.*, No. 4:06-CV-00868 GTE, 2007 WL 990260 (E.D. Ark. Mar. 28, 2007); *Applewhite-Bey v. Tripoli*, Civ. No. 05-2160 DSD/RLE, 2007 WL 892566 (D. Minn. Mar. 21, 2007); *Smith v. United States Postal Service Inspector General*, No. 4:06 CV 01631 SWW, 2007 WL 537712 (E.D. Ark. Feb. 16, 2007); *Passley v. Poplar Bluff Police Dep't.*, No. 1:07CV3 FRB, 2007 WL 427793 (E.D. Mo. Feb. 2, 2007). This number is most likely a significant under-representation of the actual figure, given that many district court rulings are not available via computer databases.

[15] *See Hill v. Bradley County Bd. of Educ.*, No. 1:05-CV-279, 2007 WL 4124495 (E.D. Tenn. Nov. 19, 2007); *Welles v. Chattanooga Police Dep't*, No. 1:07-CV-71, 2007 WL 3120823 (E.D. Tenn. Oct. 23, 2007); *Kunz v. Franklin City School Dist. Bd. of Educ.*, No. 1:06-CV-012, 2007 WL 2835627 (S.D. Ohio Sept. 26, 2007); *Jackson v. Herrington*, No. 4:05CV-186, 2007 WL 2462185 (W.D. Ky. Aug. 29, 2007); *Patrick v. Bobby*, No. 4:06CV639, 2007 WL 2446574 (N.D. Ohio Aug. 23, 2007); *Hutton v. Jackson*, No.

II. The Eighth Circuit's Rule Is Wrong on the Merits.

Certiorari is also warranted because the *per se* rule applied by the Eighth Circuit is contrary to this Court's precedents, which make clear that when a plaintiff does not indicate in which capacity a defendant has been sued, courts should look to the course of proceedings to determine whether it seeks to hold the defendant liable in her personal or official capacity. Thus, in *Brandon v. Holt*, 469 U.S. 464 (1985), this Court concluded that although "petitioners did not expressly allege at the outset of the litigation that they were suing [a defendant] in his official capacity as Director of Police of the Memphis Police Department," the course of proceedings nonetheless "ma[d]e it abundantly clear that the action against Chapman was in his official capacity and only in that capacity." *Id.* at 469. And in *Kentucky v. Graham*, 473 U.S. 159 (1985), this Court – discussing the difference between individual- and official-capacity suits – noted that "in many cases, the complaint will not clearly specify whether officials are being sued

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1:06CV65, 2007 WL 2111102 (S.D. Ohio July 19, 2007); *Thornton v. Commonwealth of Kentucky*, Civ. No. 4:06CV-46-M, 2007 WL 1662690 (W.D. Ky. June 5, 2007); *Sanders v. Henderson County Detention Ctr.*, Civ. No. 4:07CV-P62-M, 2007 WL 1545941 (W.D. Ky. May 29, 2007); *Moore v. McCracken County Jail*, Civ. No. 5:06CV-P146-R, 2007 WL 855337 (W.D. Ky. Mar. 15, 2007); *Edmonds v. Turner*, No. 3:03CV7482, 2006 WL 3716796 (N.D. Ohio Dec. 14, 2006); *Neels v. Hamilton*, Civ. No. 3:06CV-P-168-H, 2006 WL 2847170 (W.D. Ky. Sept. 28, 2006); *Easterly v. Budd*, No. 4:06 CV 00186, 2006 WL 2404143 (N.D. Ohio Aug. 18, 2006); *Johnson v. United States Secret Service*, No. 06-2114-B/An., 2006 WL 1007247 (W.D. Tenn. Apr. 18, 2006); *Marshall v. Green County*, No. 1:05CV-130, 2006 WL 335829 (W.D. Ky. Feb. 13, 2006).

personally, in their official capacities, or both." *Id.* at 167 n.14. In such cases, the Court continued, "'[t]he course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed." *Id.* (quoting *Brandon*, *supra*).

The Eighth Circuit's *per se* rule requiring a plain statement that a defendant is sued in her individual capacity is also contrary to both Federal Rule of Civil Procedure 8(a)(2) and this Court's precedents construing the Rule. Rule 8(a)(2) – which was intended to "discourage battles over mere form of statement and to sweep away the needless controversies which [previous] codes permitted," 5 C. Wright & A. Miller, Federal Practice and Procedure § 1201, at 67 n.11 (Advisory Comm. 1955 Report) – makes clear that a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Indeed, in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit*, 507 U.S. 163 (1993), this Court expressly held that courts may not impose pleading standards "more stringent than the usual pleading requirements of Rule 8(a) . . . in [§ 1983] civil rights cases alleging municipal liability," reasoning that such standards would be irreconcilable with the "liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 164.

Nor is the Eighth Circuit's *per se* rule required by Federal Rule of Civil Procedure 9(a), which requires plaintiffs to specify a "party's capacity to sue or be sued" in the complaint only "when required to show that the court has jurisdiction." Although the Eighth Circuit has sometimes sought to justify its "clear

statement" rule on the grounds that the Eleventh Amendment presents a "jurisdictional limit on federal courts in civil rights cases against states and their employees," such that a plaintiff must specify in the complaint whether a defendant is being sued in her individual or official capacity, *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989), that justification is – as Judge Gruender noted in this case – at best "debatable," Pet. App. 12a. And in any event, that rationale is entirely inapposite in cases, such as this one, in which respondents are county officials and thus not entitled to immunity under the Eleventh Amendment. *Id.*

By contrast, because it looks to the entirety of the complaint and the events that followed it, the "course of proceedings" test balances the defendant's interest in "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957), with the plaintiff's interest in pursuing viable claims without being thwarted by inadvertent mistakes in pleading. As this Court has reiterated, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." *Id.* at 48.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 15, 2008

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 06-2838

Joshua D. BAKER, Plaintiff-Appellant,

v.

Eric CHISOM, Drew County Deputy Sheriff, in His Official and Individual Capacities; Marcia Bruner, Drew County Deputy Sheriff, in Her Individual and Official Capacities, Defendants-Appellees.

Submitted: Feb. 14, 2007

Filed: Aug. 28, 2007

Before LOKEN, Chief Judge, GRUENDER and BENTON, Circuit Judges.

LOKEN, Chief Judge.

Early on August 15, 2002, Joshua Baker was arrested for traffic violations after leading police on a late-night, half-mile chase. While awaiting arrival of the arresting officer at the Drew County Jail, Deputy Sheriff Marcia Bruner handcuffed Baker's right arm to a bench and watched as Deputy Sheriff Eric Chisom choked Baker from behind and tasered him in the back of the head. After Chisom was convicted of third degree battery, Baker sued Chisom, Bruner, and other County defendants under 42 U.S.C. § 1983, asserting claims of excessive force, deliberate indifference, failure to train and supervise, and failure to maintain adequate County policies. In September 2004, on the eve of trial and with defendants' motion for summary

judgment pending, Baker moved for a voluntary non-suit. On October 12, 2004, the district court granted Baker a non-suit as to defendants Chisom and Bruner. The court denied a non-suit and dismissed all claims against the other County defendants with prejudice.

On September 22, 2005, Baker filed a second action, asserting the same claims against Chisom and Bruner. Unlike his first complaint, the second complaint specifically named Chisom acting "in his official and individual capacities" and Bruner acting "in her individual and official capacities." The district court[1] dismissed the individual capacity claims as time-barred and the official capacity claims on the merits. The court also dismissed a state law tort claim added in Baker's First Amended Complaint. Baker appeals all three rulings. We affirm.

I. The Individual Capacity Claims.

The applicable state law statute of limitations governs § 1983 claims. *See Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980). Baker's claims against Chisom and Bruner in their individual capacities are subject to the three-year Arkansas statute of limitations. *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991). If an Arkansas plaintiff files a timely action and then "suffers a nonsuit," he "may commence a new action within one (1) year." Ark. Code. Ann. § 16-56-126. We apply that savings statute to § 1983 claims. *Whittle v. Wiseman*, 683 F.2d 1128, 1129 (8th Cir. 1982). Baker filed this

[1] The HONORABLE J. LEON HOLMES, Chief Judge of the United States District Court for the Eastern District of Arkansas.

action three years and six weeks after the August 2002 incident. Thus, unless tolled, the individual capacity claims are time-barred. Only causes of action pleaded in the non-suited action are tolled by the one-year savings statute. *Dillaha v. Yamaha Motor Corp.*, 23 F.3d 1376, 1377-78 (8th Cir. 1994).

A plaintiff may assert § 1983 claims against a public official acting in his individual capacity and in his official capacity. For many reasons, including exposure to individual damage liability and the State's Eleventh Amendment immunity, these are different causes of action. "[T]he distinction between official-capacity suits and personal-capacity suits is more than a mere pleading device." *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (quotation omitted).

This brief background brings to the fore an issue this court has often considered-when has a plaintiff properly asserted § 1983 claims against a public official acting in his individual capacity. We have repeatedly stated the general rule: "If a plaintiff's complaint is silent about the capacity in which [he] is suing the defendant, we interpret the complaint as including only official-capacity claims." *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 619 (8th Cir. 1995); *see Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989). "If the complaint does not specifically name the defendant in his individual capacity, it is presumed he is sued only in his official capacity." *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178, 1182 (8th Cir. 1998).

Baker's first complaint named as defendants "ERIC CHISOM; MARCIA BRUNER; LARON

MEEKS, Individually and in his Capacity as Sheriff of Drew County; and DREW COUNTY QUORUM COURT MEMBERS [naming the nine members], in their Official Capacities and in their Individual Capacities." The County defendants other than Chisom and Bruner filed an Answer "in both their individual and official capacities." The same defense counsel then filed separate Answers by Chisom and Bruner but only in their official capacities. Some months later, all defendants moved for summary judgment. They argued, in part, that Chisom and Bruner were sued only in their official capacities and therefore "[n]one of the defendants named in their individual capacities had any personal involvement in the subject incident." Without responding to this contention, Baker moved to voluntarily non-suit the complaint without prejudice. Defendants objected to a non-suit "without first resolving the Defendants' Motion for Summary Judgment," noting they had incurred litigation time and expense.

The district court dismissed Baker's claims against the other County defendants with prejudice because Baker failed to submit evidence refuting their motion for summary judgment or even a statement of material facts in dispute. However, the court granted Baker's non-suit motion and dismissed the claims against Chisom and Bruner without prejudice, explaining:

> The undisputed facts establish that Chisom committed battery against Baker, and that Bruner observed the battery but did nothing to stop it. Had Baker not filed a motion for voluntary non-suit, the Court would have

> given Baker the opportunity to amend the complaint to make it clear and unambiguous that he was suing Chisom and Bruner in their individual capacities, and the Court would have continued the trial date ... to avoid any prejudice to Chisom and Bruner. The Court would not have entered a judgment in favor of Chisom and Bruner that would have barred Baker's claims against them.... Chisom and Bruner will not be prejudiced by a dismissal.

When his first complaint was dismissed without prejudice, Baker had ten months in which to file individual capacity claims against Chisom and Bruner within the three-year statute of limitations. Instead, he waited eleven months. The district court granted summary judgment and dismissed the individual capacity claims as time-barred, rejecting Baker's contention that the claims are timely under the one-year non-suit savings statute.

On appeal, Baker argues that his first complaint adequately named Chisom and Bruner in their individual capacities because the substantive paragraphs included a reference to Chisom and Bruner as "individual Defendants" and prayed for "exemplary damages" that may not be recovered in an official capacity suit. But our cases require more than ambiguous pleading. *See Andrus ex rel. Andrus v. Arkansas*, 197 F.3d 953, 955 (8th Cir. 1999) ("specific pleading of individual capacity is required"); *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999) ("only an express statement that [public officials] are being sued in their individual capacity

will suffice"); *Murphy v. State of Arkansas*, 127 F.3d 750, 754 (8th Cir. 1997) ("a clear statement that officials are being sued in their personal capacities" is required). A "cryptic hint" in plaintiff's complaint is not sufficient. *Egerdahl*, 72 F.3d at 620.

The caption of Baker's first complaint named ten other County defendants "in their Official Capacities and in their Individual Capacities." The caption was silent as to the capacities in which Chisom and Bruner were named. The body of the complaint contained no "clear statement" or "specific pleading" of individual capacity, only allegations that were, at most, "cryptic hints." Defendants made their interpretation of the complaint crystal clear. Chisom and Bruner filed separate Answers only in their official capacities, and defendants' motion for summary judgment argued that no individual capacity claims had been asserted against Chisom and Bruner. Baker did not contest this assertion. The district court in granting non-suit observed that it would have allowed Baker "to amend the complaint to make it clear and unambiguous that he was suing Chisom and Bruner in their individual capacities." In these circumstances, we agree with the district court that Baker's first complaint did not include the requisite clear statement that Chisom and Bruner were being sued in their individual capacities. Therefore, the one-year savings statute did not apply, and these claims were properly dismissed as time-barred.[2]

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[2] Baker argues that the Eighth Circuit "holds a lonely position" on this issue and urges us to adopt the "flexible approach" of other circuits. This argument must be addressed to the court en banc.

Baker next argues that *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005), implicitly overruled our *Egerdahl* line of decisions. This contention is without merit. In *Doe*, we applied recent Supreme Court decisions and held that "[t]he only permissible heightened pleading requirements" in § 1983 suits against individual defendants "are those contained in the Federal Rules of Civil Procedure" or in federal statutes. 403 F.3d at 989. Rule 8(a)(2) of the Federal Rules provides that each complaint shall contain "a short and plain statement of the claim." Requiring an "express statement" that a defendant is sued in his or her individual capacity is consistent with this Rule. More than twenty years ago, Chief Judge Donald Lay provided Eighth Circuit practitioners with a clear and simple statement that satisfies this pleading requirement. *Rollins by Agosta v. Farmer*, 731 F.2d 533, 536 n. 3 (8th Cir. 1984). That instruction was not a heightened pleading requirement in 1984 nor is it today.[3]

Finally, Baker argues that equitable tolling should be applied to avoid the time bar because the district court acknowledged that its dismissal order in the first case may have "contributed to the confusion." A plaintiff must be "reasonably diligent" to be entitled to equitable tolling of an applicable statute of limitations. *Stracener v. Williams*, 84 Ark. App. 208, 137 S.W.3d 428, 431 (2003). Here, as we have explained, Baker was not the least bit diligent. He allowed the last ten months of the initial three-year

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[3] After *Doe*, at least one panel has favorably cited the "clear statement" rule of *Egerdahl* and *Nix*, though without discussing this issue. *Larson v. Kempker*, 414 F.3d 936, 939 (8th Cir.2005).

limitations period to expire despite repeated warnings-by defendants' pleadings, by the district court's dismissal order, and by controlling Eighth Circuit precedent-that his first complaint failed to assert claims against Chisom and Bruner in their individual capacities. The district court properly declined to apply equitable tolling.

II. The Official Capacity Claims.

Baker's complaint in the second action asserted the same official capacity claims against Chisom and Bruner that were asserted against all defendants in the first action. In the first action, the district court granted summary judgment and dismissed these claims against the other County defendants with prejudice. The doctrine of res judicata or claim preclusion bars relitigation of a § 1983 claim if the prior judgment was a final judgment on the merits rendered by a court of competent jurisdiction, and if the same cause of action and the same parties or their privies were involved in both cases. *Murphy v. Jones*, 877 F.2d 682, 684 (8th Cir. 1989).

A suit against a government official in his or her official capacity is "another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dep't of Social Services*, 436 U.S. 658, 690 n.55 (1978). "[T]he real party in interest in an official-capacity suit is the governmental entity and not the named official." *Hafer*, 502 U.S. at 25. The doctrine of res judicata bars a plaintiff from suing a succession of public officials on the same official-capacity claim. *See Micklus v. Greer*, 705 F.2d 314, 317 (8th Cir. 1983); *Young v. City of St. Charles*, 34 Fed. Appx. 245 (8th

Cir.), *cert. denied*, 537 U.S. 1035 (2002). In the first action, when the district court issued a final order dismissing on the merits the official-capacity claims against the other County defendants, it resolved the merits of the official-capacity claims against all defendants, even if the court did not make this clear in granting a non-suit and dismissing all claims against Chisom and Bruner without prejudice. Thus, Baker's official-capacity claims against Chisom and Bruner are barred by the doctrine of res judicata. We need not consider whether the district court properly dismissed those claims on the merits.[4]

III. The Pendent State Law Claim.

Finally, Baker argues that the district court erred in dismissing with prejudice his state law claim for "conduct of another person that would constitute a felony under Arkansas law." Ark. Code Ann. § 16-118-107. After Baker filed his amended complaint asserting this claim, Chisom and Bruner moved for summary judgment dismissing "Plaintiff's Complaint." Neither defendants' nor Baker's motion papers addressed this claim, except for Baker's assertion in his disputed fact statement "that Chisom's conduct amounted to felonious conduct" even though Chisom was convicted of a misdemeanor, third degree battery. *See* Ark. Code Ann. § 5-13-203.

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[4] On appeal, Baker primarily argues that he presented sufficient evidence of official capacity liability because the County had no policies regarding the use of choke holds and tasers. This theory would not likely survive our recent en banc decision in *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 392-93 (8th Cir.2007).

The district court granted defendants' summary judgment motion and dismissed the entire complaint without discussing the state law claim. Having dismissed all federal claims, the court had discretion to dismiss this pendent state law claim without prejudice. However, because the state law claim arose out of the same core of operative facts, and because Baker failed to defend that claim or to urge that it be dismissed without prejudice, the district court did not commit plain error or abuse its discretion in exercising its supplemental jurisdiction under 28 U.S.C. § 1367 to dismiss this late-filed pendent claim with prejudice. *See Ivy v. Kimbrough*, 115 F.3d 550, 552-53 (8th Cir. 1997).

The judgment of the district court is affirmed.

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

I concur fully in parts I and II of the Court's judgment and opinion but dissent with respect to part III.

Although our circuit's current precedent mandates the outcome the Court reaches in parts I and II, I write separately to express my concern about the Eighth Circuit's judicially-created suggestion that "section 1983 litigants wishing to sue government agents in both capacities should simply use the following language: 'Plaintiff sues each and all defendants in both their individual and official capacities.'" *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989) (quoting *Rollins by Agosta v. Farmer*, 731 F.2d 533, 536 n.3 (8th Cir. 1984)). Since *Nix*, this suggestion has mutated into a bright-line presumption

that "[i]f a plaintiff's complaint is silent about the capacity in which she is suing the defendant, we interpret the complaint as including only official-capacity claims." *Egerdahl v. Hibbing Cmty. Coll.*, 72 F.3d 615, 619 (8th Cir.1995). This presumption had its genesis in *Nix* based upon our perception of Federal Rule of Civil Procedure 9(a) and the Eleventh Amendment's limitations on federal court jurisdiction. Rule 9(a) provides, "[i]t is not necessary to aver the capacity of a party to sue or be sued ... except to the extent required to show the jurisdiction of the court." Coupled with the observation that "[t]he Eleventh Amendment presents a jurisdictional limit on federal courts in civil rights cases against states and their employees," concluded that "Rule 9(a) appears to require Nix to make a capacity stipulation in the complaint." *Nix*, 879 F.2d at 431. A close inspection of the cases in which we have required litigants to specify the capacity in which a defendant is being sued have, with few exceptions, involved state actors arguably entitled to an Eleventh Amendment immunity defense.[5]

As at least one other circuit has pointed out, the logic laid out in *Nix* supporting our presumption may be faulty in its premise. *See Biggs v. Meadows*, 66 F.3d 56, 59-60 (4th Cir. 1995). Unlike subject matter jurisdiction, Eleventh Amendment immunity is not

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[5] Among the exceptions are *Johnson v. Outboard Marine Corp.*, 172 F.3d 531 (8th Cir.1999) and *Artis v. Francis Howell N. Band Booster Ass'n, Inc.*, 161 F.3d 1178 (8th Cir. 1998). Because these cases have applied our bright-line presumption to § 1983 cases not involving Eleventh Amendment immunity, I believe that they are controlling as to the instant case.

"jurisdictional in the sense that it must be raised and decided by [a] Court on its own motion." *Patsy v. Bd. of Regents*, 457 U.S. 496, 515 n.19 (1982). Also unlike subject matter jurisdiction, a party entitled to sovereign immunity may waive it. *See Grand River Enters. Six Nations, Ltd. v. Beebe*, 467 F.3d 698, 701 (8th Cir. 2006). While the operation of Rule 9(a) in § 1983 cases with Eleventh Amendment issues may be debatable, it appears that Rule 9(a) has no express application in cases like this one, where the defendants cannot assert Eleventh Amendment immunity. *See N. Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189 (2006) (noting that the Supreme Court "has repeatedly refused to extend sovereign immunity to counties"). The overwhelming majority of our sister circuits uniformly take a different approach to capacity-pleading issues, *see Powell v. Alexander*, 391 F.3d 1, 22 & n.25 (1st Cir. 2004) (adopting the "course of proceedings" test used in the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits), and our rule seems to be swimming against recent currents from the Supreme Court regarding notice pleading, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-14 (2002); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005) (recognizing that *Swierkiewicz* has abrogated Eighth Circuit § 1983 heightened pleading requirements).

With respect to part III of the Court's opinion, I respectfully dissent. In my view, dismissal of the state law claim with prejudice is an abuse of discretion where the movants did not address the state law claim in their summary judgment motion and the district court was similarly silent on the claim. "It is well settled the party seeking summary judgment must

first identify grounds demonstrating the absence of a genuine issue of material fact." *Robinson v. White County*, 459 F.3d 900, 902 (8th Cir. 2006) (quotation and alteration omitted) (reversing the district court's dismissal of state law claims because the party seeking summary judgment failed to identify grounds demonstrating the absence of a genuine issue of material fact with respect to those claims and the district court failed to articulate a basis for dismissing those claims). In *Ivy v. Kimbrough*, the district court did address the state law claims at issue there when it concluded that there was no evidence to support them or the § 1983 claims, which relied on the same core facts. 115 F.3d 550, 553 (8th Cir. 1997). Here, I do not find it particularly relevant that the state law claim at issue "arose out of the same core of operative facts" as the federal claims because the federal claims were dismissed on limitations and immunity grounds, and it is not clear that an immunity analysis under Arkansas law would reach the same result.[6]

Even assuming that we should review this issue under a plain error standard,[7] the movants here failed to meet their predicate burden of establishing their entitlement to summary judgment on the state law claim, and the district court's dismissal of that claim

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[6] The parties neither briefed nor argued Arkansas immunity issues.

[7] I am not convinced that plain error review is appropriate here where the defendants' motion for summary judgment failed to address the state law claim at all and where they only requested "the summary dismissal of Plaintiff's Complaint," without clearly requesting that the dismissal be with prejudice. The nonmoving party should not have a duty to "preserve" an issue that the moving party has not specifically put at issue.

with prejudice leaves Baker worse off for having pled the claim in federal court.[8] *See Olson v. Ford Motor Co.*, 481 F.3d 619, 627 (8th Cir. 2007) ("Under [the plain error] standard, a verdict should be reversed only if the error has prejudiced the substantial rights of a party and would result in a miscarriage of justice if left uncorrected.").

Under these circumstances, I would direct the district court to dismiss the state law claim without prejudice.

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[8] Although Baker would have faced a statute of limitations issue with respect to the state law claim, he also might have had recourse to tolling of the limitations period. *See Ragland v. Alpha Aviation, Inc.*, 285 Ark. 182, 686 S.W.2d 391, 393 (1985).

UNITED STATES DISTRICT COURT

E.D. Arkansas, Pine Bluff Division

Joshua D. BAKER, Plaintiff,

v.

Eric CHISOM, Drew County Deputy Sheriff, in His Individual and Official Capacities; and Marcia Bruner, Drew County Deputy Sheriff, in her Individual and Official Capacities, Defendants.

No. 5:05CV00271 JLH

July 12, 2006

OPINION

Joshua Baker brought this action on September 22, 2005, under 42 U.S.C. § 1983 against Eric Chisom and Marcia Bruner for their conduct while Baker was being held at the Drew County Detention Facility during the night of August 14-15, 2002. This action is Baker's second attempt to hold Chisom and Bruner liable for their conduct that night. In the first suit, Baker named Chisom and Bruner as defendants, as well as Sheriff Meeks in his individual and official capacity, and the members of the Drew County Quorum Court in their individual and official capacities. In the first suit, the Court granted summary judgment in favor of Sheriff Meeks in his individual and official capacities and the members of the quorum court in their individual and official capacities but granted Baker's motion for voluntary nonsuit against the defendants Chisom and Bruner.

In this suit, Chisom and Bruner in their individual capacities have now moved to dismiss Baker's claims against them. They argue that those claims are time barred. Chisom and Bruner in their official capacities have also moved for summary judgment. They argue that the claims against them are barred by res judicata and, in the alternative, that there is no evidence to support the official-capacity claims. For the following reasons, the defendants' motion to dismiss and motion for summary judgment are granted.

I.

A. Rule 12(b)(6) Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should only be granted if it appears beyond a doubt that the plaintiff can prove no set of facts to warrant a grant of relief. *Gilmore v. County of Douglas, Neb.*, 406 F.3d 935, 937 (8th Cir. 2005). In considering a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff. *Coleman v. Watt*, 40 F.3d 255, 258 (8th Cir. 1994). All facts alleged are taken as true and all reasonable inferences drawn in the favor of the plaintiff. *Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006). The Court, however, is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002).

B. Summary Judgment Standard

A court should enter summary judgment if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 847, 850 (8th Cir. 2005). A genuine issue of material fact exists only if there is sufficient evidence to allow a jury to return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 249.

II.

The events giving rise to this action occurred on August 14-15, 2002. Baker filed his first suit on June 24, 2003. In his complaint, Baker named in the caption as defendants "Eric Chisom; Marcia Bruner; Laron Meeks, Individually and in his Capacity as Sheriff of Drew County; and Drew County Quorum Court Members ... in their official capacities and in their Individual Capacities." Baker stated in the body of the complaint that "Defendants Drew County and the Drew County Sheriff, Laron Meeks, were the employers of Eric Chisom and Marcia Bruner, named herein as individual Defendants." Baker alleged that, on the night of August 14-15, 2002, Chisom placed Baker in a choke hold on more than one occasion and shocked Baker with a taser while Baker was at the Drew County Detention Facility for processing on traffic violations. He alleged that Bruner saw the assault but failed to take action to stop it. He also alleged that "[a]t the time of the incident ... Drew

County ... refused to or did not adequately supervise the operation of the jail and the deputy sheriffs."

The defendants moved for summary judgment on August 25, 2004. Among other things, the defendants argued that Chisom and Bruner were only sued in their official capacities since the complaint did not unambiguously state that they were sued in their individual capacities. The defendants argued that all the claims against them in their official capacities should be dismissed because the acts Baker complained of did not implement or execute an unconstitutional county policy or custom. Baker filed a response to the motion for summary judgment on September 17, 2004. On September 23, 2004, Baker filed a motion for voluntary nonsuit. The defendants opposed Baker's motion for voluntary nonsuit. In its October 12, 2004, Opinion and Order, the Court stated that "Meeks and the members of the quorum court had established a prima facie entitlement to summary judgment on claims against them individually and in their official capacities." The Court therefore granted summary judgment on all of Baker's claims against Sheriff Meeks and the members of the quorum court in their individual and official capacities. Regarding summary judgment on behalf of defendants Bruner and Chisom, however, the Court stated:

> The situation is different as to Chisom and Bruner. The undisputed facts establish that Chisom committed battery against Baker, and that Bruner observed the battery but did nothing to stop it. Had Baker not filed a motion for voluntary non-suit, the Court would have given Baker the opportunity to

> amend the complaint to make it clear and unambiguous that he was suing Chisom and Bruner in their individual capacities, and the Court would have continued the trial date, if necessary, to avoid any prejudice to Chisom and Bruner. The Court would not have entered a judgment in favor of Chisom and Bruner that would have barred Baker's claims against them.

The Court therefore granted Baker's motion for voluntary nonsuit regarding the claims Baker brought against Chisom and Bruner and dismissed those claims without prejudice.

On September 22, 2005, Baker filed this lawsuit. Baker named as defendants Chisom and Bruner in their individual and official capacities. The basis for Baker's claims in this action is the same August 14-15, 2002, incident alleged in his previous complaint. On October 6, 2005, Bruner and Chisom, in their official capacities only, moved to dismiss the complaint. They argued that Baker's current lawsuit was barred by the three-year statute of limitations on § 1983 actions. In its October 31, 2005, Opinion and Order, the Court denied the defendants' motion to dismiss. The Court held that the original suit was brought against Chisom and Bruner in their official capacities, so the one-year savings statute in Arkansas tolled the statute of limitations. The Court also stated that, because Bruner and Chisom had appeared in this case in their official capacities only, they did not have standing to move to dismiss on behalf of the individual-capacity defendants.

Bruner and Chisom in their individual capacities have now moved to dismiss, while in their official capacities they have moved for summary judgment.

III.

A. Liability of Chisom and Bruner in Their Individual Capacities

Chisom and Bruner in their individual capacities argue that Baker's current action is barred by the applicable statute of limitations. The statute of limitations in this case is three years. *Ketchum v. City of West Memphis*, 974 F.2d 81, 82 (8th Cir. 1992). This complaint was not filed until more than three years after the events detailed in the complaint occurred. Baker attempts to avoid the application of the statute of limitations by arguing that the Arkansas saving statute applies to his claims against Chisom and Bruner in their individual capacities. The saving statute allows a plaintiff who nonsuits an action filed within the period of limitations to file a new action within one year of the nonsuit without violating the statute of limitations. Ark. Code Ann. § 16-56-126. The new action, however, must be "the same in substance as the original complaint at the time the latter was nonsuited." *Dillaha v. Yamaha Motor Corp., U.S.A.*, 23 F.3d 1376, 1377 (8th Cir. 1994).

In an earlier opinion in this case, the Court held that Baker's first action was against Chisom and Bruner in their official capacities alone. *See Baker v. Chisom*, No. 5:05CV00271 (E.D. Ark. Oct. 31, 2005) (Document #31) (order denying official-capacity defendants' motion to dismiss). Baker points to the passage in his original complaint that states "Eric

Chisom and Marcia Bruner [are] named herein as individual Defendants" in an attempt to have the Court reconsider its earlier ruling. That passage, however, does not clearly and unambiguously state that Baker's first action was brought against the defendants in their individual capacities.[1] According to the Eighth Circuit's rule requiring an unambiguous statement to sue municipal officials in their individual capacities, the first action had to be treated as a suit against Bruner and Chisom in their official capacities only. *Johnson v. Outboard Marine Corp.*, 172 F.3d 531, 535 (8th Cir. 1999). Bruner and Chisom in their individual capacities were therefore not parties to the first suit. *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985). In the first suit, Bruner and Chisom answered only in their official capacities. Because Bruner and Chisom in their individual capacities were not parties to the first suit, the savings statute could not affect the running of the three-year limitations period as to Baker's claims against them. *Accord González-Alvarez v. Rivero-Cubano*, 426 F.3d 422, 428 (1st Cir. 2005) ("[D]efendants sued only in their official capacities in the original complaint cannot be expected to be on notice of the very different issues raised by claims

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[1] In his brief, Baker asks the Court to take judicial notice of two cases in this district which, Baker argues, support his position. In both of the cases of which Baker asks this Court to take judicial notice, however, the complaints state that the defendants are being "sued in their official and individual capacities." The Eighth Circuit has repeatedly reiterated that such language-unlike the passage in Baker's first complaint-is unambiguous and "guarantees that the defendant receives prompt notice of his or her potential personal liability." *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir.1989).

against them in their personal capacities."); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995); *Ladien v. Bd. of Trustees, Univ. of Ill.*, No. 93-6573, 1994 WL 395078, at *4 (N.D.Ill. July 27, 1994).

In an attempt to avoid this logic, Baker argues that the Eighth Circuit, in *Doe v. Cassel*, 403 F.3d 986 (2005), implicitly overruled its requirement that plaintiffs must unambiguously state that they are suing municipal officials in their individual capacity. Baker urges the Court on that basis to reverse its October 2005 ruling and find that the first action was against Bruner and Chisom in their individual capacities. The Court declines. Cassel held that in a suit against an official in his individual capacity a court cannot fix heightened requirements for pleading a claim for relief. 403 F.3d at 988; Fed. R. Civ. P. 8(a). The Eighth Circuit rule requiring an unambiguous statement that an official is being sued in his individual capacity does not address the requirements for pleading a claim for relief. The rule aims to ensure that persons who have been sued know with certainty whether they have been sued in their individual capacities and, where state officers are involved, to ensure that federal courts adhere to the jurisdictional limit imposed by the Eleventh Amendment. *See Johnson*, 172 F.3d at 535; *see also Nix*, 879 at 431 (noting that Fed. R. Civ. P. 9(a) requires pleading capacity with specificity in order to show jurisdiction). Furthermore, the Eighth Circuit has reiterated the rule requiring an unambiguous statement that an official is being sued in his individual capacity in a case decided after *Cassel*. *Larson v. Kempker*, 414 F.3d 936, 939 (8th Cir. 2005). That the Eighth Circuit has explicitly reasserted the rule requiring unambiguous

statement of individual capacity after *Cassel* eviscerates Baker's argument that *Cassel* did away with that rule.

As a final, last-ditch argument, Baker argues that substantial justice requires the statute of limitations to be equitably tolled in this case. A plaintiff must be reasonably diligent to take advantage of the doctrine of equitable tolling. *Stracener v. Williams*, 84 Ark. App. 208, 213, 137 S.W.3d 428, 431 (2003). Equitable tolling is appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands. *Hallgren v. U.S. Dep't of Energy*, 331 F.3d 588, 590 (8th Cir. 2003). Baker's first action was voluntarily nonsuited on October 12, 2004. At any point during the ten months before August 15, 2005, Baker could have refiled his action against the defendants in their individual capacities and avoided the application of the statute of limitations. Baker's claims against the defendants in their individual capacities are therefore dismissed as time barred.

B. Liability of Bruner and Chisom in Their Official Capacities

Bruner and Chisom in their official capacities assert that Baker's suit is barred by res judicata. Res judicata, or claim preclusion in this case, bars claims when (1) a prior judgment was rendered by a court of competent jurisdiction; (2) that prior judgment was final and on the merits; and (3) it involved the same cause of action and the same parties or privies. *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 669 (8th Cir. 2006). Baker filed his original action against Sheriff

Meeks and the members of the quorum court in their official capacities. That Baker sued those defendants in their official capacities means that he essentially brought a suit against the county itself. *See Liebe v. Norton*, 157 F.3d 574, 578 (8th Cir.1998). Baker alleged in his original complaint that the county failed to supervise adequately the operation of the jail and the deputy sheriffs, and that such failures resulted in Chisom injuring Baker by placing Baker in a choke hold several times and zapping Baker with a taser. In response to Baker's original complaint, Drew County brought a motion for summary judgment in which it argued that Baker had failed to show that the acts he complained of implemented or executed an unconstitutional county policy or custom, a prerequisite to municipal liability. In its October 12, 2004, Opinion and Order, the Court granted summary judgment on behalf of Sheriff Meeks and the members of the quorum court in their official capacities. However, the Court dismissed without prejudice the claims against Chisom and Bruner, which were official-capacity claims. In hindsight, it may have been inconsistent for the Court to dismiss without prejudice the official-capacity claims against Chisom and Bruner while granting summary judgment on the official-capacity claims against other defendants, but that is what the Court did. Because the claims against Chisom and Bruner, which were official-capacity claims, were dismissed without prejudice, Baker was free to refile those claims.

However, even though res judicata does not apply, Baker's claims against the county still fail. There is no evidence that the county had a policy or custom that unconstitutionally deprived Baker of his

constitutional rights. *Kuha v. City of Minnetonka*, 365 F.3d 590, 603-04 (8th Cir. 2004). There is no evidence that Chisom and Bruner acted pursuant to official county policy or that misconduct of the sort they committed was "so pervasive as to constitute a custom or usage with the force of law." *Id.* (quoting *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 691 (1978). There is no evidence that the county failed to provide training or failed in some other manner under circumstances that manifest deliberate indifference to Baker's constitutional rights. *Larson v. Miller*, 55 F.3d 1343, 1350 (8th Cir. 1995); *P.H. v. School Dist. of Kansas City, Mo.*, 265 F.3d 653, 658-59 (8th Cir. 2001). Summary judgment is granted in favor of Bruner and Chisom in their official capacities on all of Baker's claims.

CONCLUSION

The Court has reluctantly concluded that Baker's claims against Chisom and Bruner in their individual capacities are barred by the statute of limitations. It seems likely that Baker's lawyer believed that he had twelve months from the entry of the order dismissing the prior case within which to file this suit. Such confusion could occur easily in a circumstance such as this one, where Baker's first lawyer had sued Chisom and Bruner without clearly and unambiguously stating whether they were sued in their individual capacities, and then the Court had dismissed the case without prejudice. It is entirely possible that this Court's well intended but poorly written order of dismissal in the prior case contributed to the confusion. Unfortunately for Baker, the Court has

found no law that would save the individual-capacity claims from the statute of limitations.

While there is evidence that Baker was physically abused, there is no evidence that the culprits acted pursuant to official policy or under circumstances showing that Drew County had a custom for its officers to be allowed to abuse prisoners.

The individual-capacity defendants' motion to dismiss is GRANTED. Document #28. The official-capacity defendants' motion for summary judgment is GRANTED. Document #19. Baker's complaint is dismissed with prejudice. All pending motions are denied as moot.

IT IS SO ORDERED this 12th day of July, 2006

_____/S/_____

J. Leon Holmes

United States District Judge

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

No. 5:05CV00271 JLH

JOSHUA D. BAKER, PLAINTIFF

V.

ERIC CHISOM, Drew County Deputy Sheriff, in His Individual and Official Capacities; and MARCIA BRUNER, Drew County Deputy Sheriff, in Her Individual and Official Capacities, DEFENDANTS.

JUDGMENT

Pursuant to the Opinion entered separately today, judgment is hereby entered in favor of defendants on all counts.

IT IS SO ORDERED this 12th day of July, 2006.

_____/s/_____

J. LEON HOLMES

UNITED STATES DISTRICT JUDGE

United States Court of Appeals

For the Eighth Circuit

No: 06-2838

Joshua D. Baker,

Appellant,

v.

Eric Chisom, Drew County Deputy Sheriff, in his Official and Individual Capacities and Marcia Bruner, Drew County Deputy Sheriff, in Her Individual

and Official Capacities,

Appellees.

Appeal from U.S. District Court for the Eastern District of Arkansas – Pine Bluff

(5:05-cv-00271-JLH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Gruender would grant the petition for rehearing en banc.

Judge Murphy and Judge Shepherd did not participate in the consideration or decision of this matter.

October 05, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/

Michael E. Gans

In the United States District Court

Eastern District of Arkansas

Pine Bluff Division

Case No. 5-03-CV-00238

Joshua D. Baker

v.

Eric Chisom; Marcia Bruner; LaRon Meeks, Individually and in his Capacity as Sheriff of Drew County; and Drew County Quorum Court Members John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lasiter, Damon Lampkin, Jimmy Potter, and Danny Lloyd, in their official Capacities and in their Individual Capacities

Complaint

Comes now the Plaintiff, Joshua D. Baker, by and through his attorney, David L. Chambers, and for his Complaint states:

Jurisdiction and Venue

1. This action is brought for violation of 42 U.S.C. §1983 to redress the deprivation of past violations of the Fourth and Fourteenth Amendments to the Constitution of the United States.

2. This Court has jurisdiction over the Plaintiff's state law claims under the doctrine of pendent jurisdiction.

3. All of the actions, omissions and events complained of herein took place in the County of Drew, State of Arkansas, and within the venue of this Court.

4. The amount in controversy exclusive of interest and costs exceeds the sum of $50,000.00.

Parties

5. The Plaintiff, Joshua D. Baker, is a citizen of the United States and a resident of Monticello, Drew County, Arkansas.

6. The Defendant, Drew County, Arkansas, is one of the 75 counties of the State of Arkansas. Drew County, as a body politic and in conjunction with the Drew County Sheriff, the Defendant LaRon Meeks, is responsible for the policies, practices and customs of the Sheriff's Department, as well as the hiring, training, supervision, control and discipline of its Deputy Sheriffs. The Defendants Drew County and the Drew County Sheriff, LaRon Meeks, were the employers of Eric Chisom and Marcia Bruner, named herein as individual Defendants. The Defendants Eric Chisom and Marcia Bruner were at the time of the event complained of herein residents of Drew County, Arkansas, and were employed as Deputy Sheriffs of Drew County. The Defendants John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lasiter, Damon Lampkin, Jimmy Potter and Danny Lloyd were, at the time of the event

complained of herein, members of the Drew County Quorum Court.

Factual Allegations

7. On the night of August 14-15, 2002, the Plaintiff was arrested for several traffic violations by a public security officer of the University of Arkansas at Monticello. The Plaintiff was then transported by Defendant Marcia Bruner to the Drew County Detention Facility (hereinafter, the "detention facility") for processing on said traffic violations.

8. Before the arresting officer made his way to the detention facility, Defendant Bruner and other agents of the Drew County office and the detention facility handcuffed the Plaintiff to a concrete bench in the booking area of the detention facility.

9. Defendant Eric Chisom, who was carrying a taser stick, then approached the Plaintiff from behind. Defendant Chisom grabbed the plaintiff around the throat and choked him for several seconds, on more than one occasion, while shocking him at least once with the taser.

Cause of Action

10. The Plaintiff realleges the foregoing as if fully set out herein.

11. At not time did the Plaintiff do anything to cause the Defendant Chisom to assault him in the manner set out hereinabove.

12. Defendant Chisom, over the period of approximately one half hour, grabbed the Plaintiff by the throat and choked him at least three different times. On at least one occasion, the Plaintiff was

pulled up over the top of the concrete bench to which he was still handcuffed as Defendant Chisom was choking the Plaintiff. On at least one of the occasions that Defendant Chisom was choking the Plaintiff, Defendant Chisom shocked the Plaintiff with the taster.

13. On each occasion that Defendant Chisom was assaulting the plaintiff, Defendant Bruner was sitting or standing within a few feet of the Plaintiff and watched during each assault. Defendant Bruner never offered the Plaintiff any assistance nor attempted to stop Defendant Chisom from committing further assaults.

14. At or shortly after the time of this assault against the Plaintiff, the Defendant LaRon Meeks, the elected Sheriff of Drew County, was made aware of these activities, but took no action against his deputies.

15. At the time of the incident described above and prior thereto, the Defendants Drew County, Drew County Sherriff LaRon Meeks, an the Drew County Quorum Court Members refused to or did not adequately supervise the operation of the jail and the deputy sheriffs employed by them.

16. At the time of the incident described above, the Defendants Eric Chisom and Marcia Bruner were acting under color of authority as agents of the Drew County Sheriff's office.

17. At the time of the incident described above, all the Defendants violated the civil rights of the Plaintiff by permitting or failing to take the steps necessary to

prevent the bodily assault by Plaintiff and by the Defendant, Eric Chisom.

18. These acts, omission, and conduct constitute official policies, practice or customs of the defendants, Drew County and Drew County sheriff LaRon Meeks, and had the effect of subjecting the Plaintiff to a deprivation of his constitutional rights under the fourth and fourteenth amendments of the Constitution of the United States, and that said policies, practices and customs were and are a proximate cause of the pain, suffering and emotional trauma sustained by the Plaintiff.

19. As a direct and proximate cause and consequence of the conduct, acts and omissions of the Defendants herein, the Defendants are liable under 42 U.S.C. § 1983 for the Plaintiff being deprived of his fourth and fourteenth amendment rights from freedom from unlawful assault, from unjustified intrusions upon his physical activity and bodily safety in the circumstances surrounding his detention and incarceration, and in an expectation of minimal standards for the operation of the detention facility and for his treatment with respect to his safety, health, well-being and security.

20. The actions of the Defendants were extreme and outrageous and beyond all possible bounds of decency and constitute the pendent state claim of the tort of outrage, for which the Defendants should be jointly and severally liable to the Plaintiff for general, special and exemplary damages.

21. The Plaintiff demands trial by jury.

WHEREFORE, the Plaintiff, Joshua D. Baker, prayers for judgment against the Defendants, jointly and severally, in the amount of $500,000.00 as compensatory damages for the pain, suffering and extreme mental anguish suffered by the Plaintiff; for $1,000,000.00 as punitive damages for deprivation of one or more of the constitutional rights of the Plaintiff; for his costs and attorney's fees incurred herein; and for all other just and proper legal and equitable relief to which he may show himself entitled.

Respectfully submitted,

Joshua D. Baker
Plaintiff

By: s/ David L. Chambers -89130
Attorney for Plaintiff
P.O. Box 236
Monticello, AR 71657
(870) 367-5969

Filed June 24, 2003

In the United States District Court
Eastern District of Arkansas
Pine Bluff Division
Case No. 5-03-CV-00238 WRW

Joshua D. Baker
PLAINTIFF

v.

Eric Chisom; Marcia Bruner; LaRon Meeks; Individually and in his Capacity as Sheriff of Drew County; and Drew County Quorum Court Members John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lastier, Damon Lampkin, Jimmy Potter, and Danny Lloyd, in their official capacities and in their Individual Capacities.
DEFENDANTS

Motion for Enlargement of Time to Answer Complaint

Come now the Separate Defendants, Eric Chisom and Marcia Bruner, in both their individual and official capacities, and move, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for an enlargement of time to Answer Plaintiff's Complaint, as follows:

1. The undersigned counsel has agreed to defend certain of the Defendants in this action and the undersigned counsel has been in the process of gathering the facts necessary for the undersigned counsel to be able to file a response to the Complaint that is in compliance with the requirements of Rule 11 of the Rules of Civil Procedure, which states that "*Every* pleading, motion, and other paper of a party represented by an attorney shall be signed by at least

one attorney ... [and] ... the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed *after reasonable inquiry* it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law... ."

2. There is a necessity to determine which defendants have been served and to possibly make arrangements for separate counsel for Separate Defendant Eric Chisom and/or Marcia Bruner (if they have been served with the Complaint), and additional time is needed to sort out issues related to these matters.

3. As explained in the accompanying Brief, this motion is not filed for the purpose of delay.

4. At the present time, it is believed by the undersigned counsel that an extension of time to October 30, 2003, will be adequate time for counsel for the Defendants to sort out the representation responsibilities, make arrangements for additional counsel to represent separate defendant(s) (if necessary), and perform the Rule 11 duties that are necessary in conjunction with filing a response to the Complaint.

WHEREFORE, Defendants request that this Motion for Enlargement of Time be granted and that Defendants and Bruner be allowed until October 30, 2003, to respond to Plaintiff's Complaint. (In the event this motion is denied, Defendants Chisom and Bruner deny each and every allegation of the Complaint.)

Respectfully submitted,
LaRon Meeks, et. al.,
Drew County Defendants

Duncan & Rainwater, P.A.
P.O. Box 17250
Little Rock, AR 72222-7250
Telephone: (501) 868-2500
Telefax: (501)868-2505

By: _____/s/_____
Michael R. Rainwater #79234
Jason E. Owens #2003003

October 07, 2003

In the United States District Court
Eastern District of Arkansas
Pine Bluff Division
Case No. 5-03-CV-00238 WRW

Joshua D. Baker
PLAINTIFF

v.

Eric Chisom; Marcia Bruner; LaRon Meeks; Individually and in his Capacity as Sheriff of Drew County; and Drew County Quorum Court Members John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lastier, Damon Lampkin, Jimmy Potter, and Danny Lloyd, in their official capacities and in their Individual Capacities.
DEFENDANTS

Answer

Comes now Separate Defendant Marcie Bruner, in her official capacity, and for her Answer to Plaintiff's Complaint, states:

1. Separate Defendant Bruner admits that jurisdiction and venue are proper in this Court, but denies the remainder of the allegations in paragraphs 1, 2, 3, and 4 of Plaintiff's Complaint.

2. Separate Defendant Bruner is without sufficient knowledge to admit or deny the allegations in paragraph 5 of Plaintiff's Complaint and, therefore denies the same.

3. Separate Defendant Bruner admits that, on or about August 14-15, 2002, she and Eric Chisom were deputy sheriffs of Drew County, Arkansas; that

Drew County, Arkansas is one of the seventy-five counties in Arkansas; that, on or about August 14-15, 2002, Laron Meeks was the Sheriff of Drew County; and that John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lasiter, Damon Lampkin, Jimmy Potter, and Danny Lloyd were members of the Drew County Quorum Court, but denies, as stated, the remainder of the allegations in paragraph 6 of Plaintiff's Complaint.

4. Separate Defendant Bruner admits that she transported the Plaintiff to the Drew County Detention Center on or about August 14th and that Plaintiff was handcuffed to the booking bench, but denies the remainder of the allegations in paragraphs 7 and 8 of Plaintiff's complaint.

5. The allegations of paragraphs 9 and 12 of Plaintiff's Complaint do not appear to be directed to Separate Defendant Bruner and, as such, do not require a response, to the extent that paragraphs 9 and 12 of Plaintiff's Complaint are directed to Separate Defendant Bruner, these allegations are, as stated, denied

6. Separate Defendant Bruner denies, as stated, the allegations in paragraphs 10, 11, and 13 of Plaintiff's Complaint.

6. The allegations of paragraphs 14 and 15 of Plaintiff's Complaint do not appear to be directed to Separate Defendant Bruner and, as such, do not require a response; to the extent that paragraphs 14 and 15 of Plaintiff's Complaint are directed to Separate Defendant Bruner, these allegations are, as stated, denied.

7. Separate Defendant Bruner admits that, on or about August 14-15, 2002, she and Eric Chisom were deputy sheriffs of Drew County, Arkansas, but denies the remainder of the allegations in paragraph 16 of Plaintiff's Complaint.

8. Separate Defendant Bruner denies, as stated, the allegations in paragraphs 17, 18, 19, and 20 of Plaintiff's Complaint.

9. Separate Defendant Bruner joins in Plaintiff's demand for a jury trial.

10. Separate Defendant Bruner specifically and generally denies each and every allegation not specifically admitted herein.

11. Separate Defendant Bruner asserts and reserves the right to file an amended answer or other appropriate pleadings and to allege any affirmative defenses that might be available to her after she has had a reasonable opportunity to investigate the allegations set forth in Plaintiff's Complaint.

Affirmative Defenses

12. Separate Defendant Bruner asserts the following affirmative defenses:

A. qualified immunity;

B. punitive damages immunity;

C. statutory tort immunity;

D. sovereign immunity;

E. Plaintiff has failed to state a claim upon which relief can be granted;

F. Defendants avail themselves of all statute of limitations defenses applicable to this claim;

Respectfully submitted,
LaRon Meeks, et. al.,
Drew County Defendants

Duncan & Rainwater, P.A.
P.O. Box 17250
Little Rock, AR 72222-7250
Telephone: (501) 868-2500
Telefax: (501) 868-2505

By: _____/s/_____
Michael R. Rainwater, #79234
Jason E. Owens, #2003003

October 31, 2003

In the United States District Court
Eastern District of Arkansas
Pine Bluff Division
Case No. 5-03-CV-00238 WRW

Joshua D. Baker
PLAINTIFF

v.

Eric Chisom; Marcia Bruner; LaRon Meeks; Individually and in his Capacity as Sheriff of Drew County, and Drew County Quorum Court Members John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lastier, Damon Lampkin, Jimmy Potter, and Danny Lloyd, in their official capacities and in their Individual Capacities.
DEFENDANTS

Answer

Comes now Separate Defendant Eric Chisom, in his official capacity, and for his Answer to Plaintiff's Complaint, states:

1. Separate Defendant Chisom admits that jurisdiction and venue are proper in this Court, but denies the remainder of the allegations in paragraphs 1, 2, 3, and 4 of Plaintiff's Complaint.

2. Separate Defendant Chisom is without sufficient knowledge to admit or deny the allegations in paragraph 5 of Plaintiff's Complaint and, therefore denies the same.

3. Separate Defendant Chisom admits that, on or about August 14-15, 2002, he and Marcie Bruner were deputy sheriffs of Drew County, Arkansas; that

drew County, Arkansas is one of the seventy-five counties in Arkansas; that, on or about August 14-15, 2002, Laron Meeks was the Sheriff of Drew County; and that John Thompson, Larkin Brown, Louis Dunlap, Laura Smith, Larry Eason, James Lasiter, Damon Lampkin, Jimmy Potter, and Danny Lloyd were members of the Drew County Quorum Court, but denies, as stated, the remainder of the allegations in paragraph 6 of Plaintiff's Complaint.

4. The allegations of paragraphs 7 and 8 of Plaintiff's Complaint do not appear to be directed to separate Defendant Chisom and, as such, do not require a response; to the extent that paragraphs 7 and 8 of Plaintiff's Complaint are directed to Separate Defendant Chisom, these allegations are, as stated, denied.

5. Separate Defendant Chisom denies, as stated, the allegations in paragraphs 9, 10, 11, and 12 of Plaintiff's Complaint.

6. The allegations of paragraphs 13, 14, and 15 of Plaintiff's Complaint do not appear to be directed to Separate Defendant Chisom and, as such, do not require a response; to the extent that paragraphs 13, 14, and 15 of Plaintiff's Complaint are directed to Separate Defendant Chisom, these allegations are, as stated, denied.

7. Separate Defendant Chisom admits that, on or about August 14-15, 2002, he and Marcie Bruner were deputy sheriffs of Drew County, Arkansas, but denies the remainder of the allegations in paragraph 16 of Plaintiff's Complaint.

8. Separate Defendant Chisom denies, as stated, the allegations in paragraphs 17, 18, 19, and 20 of Plaintiff's Complaint.

9. Separate Defendant Chisom joins in Plaintiff's demand for a jury trial.

10. Separate Defendant Chisom specifically and generally denies each and every allegation not specifically admitted herein.

11. Separate Defendant Chisom asserts and reserves the right to file an amended answer or other appropriate pleadings and to allege any affirmative defense that might be available to him after he has had a reasonable opportunity to investigate the allegations set forth in Plaintiff's Complaint.

Affirmative Defenses

12. Separate Defendant Chisom asserts the following affirmative defenses:

A. qualified immunity;

B. punitive damages immunity;

C. statutory tort immunity;

D. sovereign immunity;

E. Plaintiff has failed to state a claim upon which relief can be granted;

F. Defendants avail themselves of all statute of limitations defenses applicable to this claim;

Respectfully submitted,

LaRon Meeks, et. al.,
Drew County Defendants

Duncan & Rainwater, P.A.
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Telephone: (501) 868-2500
Telefax: (501) 868-2505

By: _____/s/_____
Michael R. Rainwater, #79234
Jason E. Owens, #2003003

October 31, 2003

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(2)

No. 07-1082

FILED

MAY 14 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JOSHUA D. BAKER,

Petitioner,

v.

ERIC CHISOM AND MARCIE BRUNER,
In Their Individual Capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, will toll the applicable statute of limitations and "save" an otherwise time-barred claim against a defendant in his individual capacity in a subsequent action where (1) the complaint in the initial action, under 42 U.S.C. § 1983, did not specify that the defendant was being sued in his individual capacity, (2) the defendant was not actually made a party to the initial action, and (3) the course of the proceedings, including the conduct of the parties and the court in the initial action, did not indicate that the defendant was being sued in his individual capacity?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Eric Chisom and Marcie Bruner, in their individual capacities, respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

Ark. Code Ann. § 16-56-126, the "Arkansas Savings Statute," provides, in pertinent part:

> (a)(1) If any action is commenced within the time respectively prescribed in this act, in §§ 16-116-101 – 16-116-107, in §§ 16-114-201 – 16-114-209, or in any other act, and the plaintiff therein suffers a nonsuit, or after a verdict for him or her the judgment is arrested, or after judgment for him or her the judgment is reversed on appeal or writ of error, the plaintiff may commence a new action within one (1) year after the nonsuit suffered or judgment arrested or reversed.

STATEMENT

The Petitioner's underlying allegations in the instant case revolve entirely around incidents that allegedly occurred in mid-August, 2002. Pet. App.

32a, ¶ 8. The Complaint in this case, however, was not filed until September 22, 2005, well over three (3) years after the alleged occurrence. *See* Pet. App. 19a.

In the original action, the Petitioner sued the Respondents as follows:

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JOSHUA D. BAKER PLAINTIFF

v. CASE NO. 5-03-CV-00238 WRW

ERIC CHISOM; MARCIA BRUNER; LARON MEEKS; Individually and in his Capacity as Sheriff of Drew County; and DREW COUNTY QUORUM COURT MEMBERS JOHN THOMPSON, LARKIN BROWN, LOUIS DUNLAP, LAURA SMITH, LARRY EASON, JAMES LASITER, DAMON LAMPKIN, JIMMY POTTER, and DANNY LLOYD, in their official capacities and in their Individual Capacities. DEFENDANTS

Pet. App. 30a.

The Petitioner sought damages, including punitive damages, jointly and severally in the original action against "the Defendants" generally (including the ten Defendants specifically named in their individual capacities). Pet. App. 35a.

The Respondents answered the Petitioner's above-cited Complaint in the original action in their official capacities only. Pet. App. 39a-46a. Neither the

Petitioner nor the district court ever moved for default judgment against the Respondents (or anyone else) in the original action.

After more than 16 months of litigation in the original action, the Respondents moved for summary judgment, arguing, *inter alia*, that the Petitioner had sued the Respondents only in their official capacities. Pet. App. 18a. The Petitioner failed to offer any rebuttal, by proof or argument, to the Respondents' argument that they had not been sued in their individual capacities. *Id.*

At the conclusion of the original action, the District Court found that Respondents Chisom and Bruner had *not* been sued in their individual capacities and that Petitioner Baker would have to file "new litigation" if he intended to sue them individually:

> Had [Petitioner] Baker not filed a motion for voluntary non-suit, the Court would have given Baker the opportunity to amend the complaint [in order to add Chisom and Bruner, in their individual capacities, as Defendants] to make it clear and unambiguous that he was suing Chisom and Bruner in their individual capacities.
>
> * * *
>
> In the event that Baker files new litigation against Chisom and Bruner, [the Defendants'] attorneys will be able to use the [discovery] answers . . . that have been developed in this case.

Pet. App. 4a-5a, 20a-21a.

This Court issued its above-cited Opinion and Order, along with its Judgment in the original action on October 12, 2004, leaving Petitioner Baker more than ten months to file "new litigation" within the prescribed statutory period against Chisom and Bruner in their individual capacities. Pet. App. 5a. Petitioner failed to do so and instead filed this action more than a month after the running of the statutory period. *Id.*

On September 22, 2005, when Petitioner finally did file suit against the Respondents in their individual capacities (well after the expiration of the applicable limitations period), the District Court reaffirmed its finding from the original action when it found (again) that Eric Chisom and Marcie Bruner were *not* sued in their individual capacities in the original action, that the tolling effect of the "Arkansas Savings Statute" thus did not apply, and that Petitioner's claim(s) against the Respondents in their individual capacities should therefore be dismissed. Pet. App. 15a-26a. The Petitioner appealed and the Eighth Circuit Court of Appeals affirmed the order of the district court. Pet. App. 1a-14a.

REASONS FOR DENYING THE PETITION

The dispositive question in this case is whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, should have applied to toll the applicable statute of limitations and "save" the Petitioner's

otherwise time-barred claim(s) against the Respondents in their individual capacities. This dispositive question, largely ignored by the Petitioner in this case, presents a disputed question of Arkansas law that must be answered in the negative based on applicable state law and the facts of the case, namely, (1) that the complaint in the initial action, under 42 U.S.C. § 1983, did not specify that the Respondents were being sued in their individual capacities, (2) that the Respondents were not actually made parties to the initial action in their individual capacities, and (3) that the course of the proceedings, including the conduct of the parties and the court in the initial action, did not indicate that the Respondents were being sued in their individual capacities. In the end, the question presented by the Petitioner is not worthy of review under the facts of this case (1) because ruling on Petitioner's question would constitute an improper advisory opinion since the dispositive question – whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, applies to toll the statute of limitations and "save" Petitioner's otherwise time-barred claim(s) against the Respondents in their individual capacities – can and should be resolved in the Respondents' favor regardless of the resolution of the question presented by Petitioner and (2) because, even under the "course of proceedings test(s)" urged by the Petitioner, the lower courts' judgments in the Respondents favor still should be affirmed. For these reasons, the Petition for a Writ of Certiorari should be denied.

I. The question presented by the Petitioner is not properly justiciable because, regardless of whether the Respondents were *constructively* named in their individual capacities in the initial suit (or should have been judicially deemed to have been so named), the Respondents were not *actually* made parties to the original suit in their individual capacities and the "Arkansas Savings Statute" is therefore not triggered to toll the otherwise expired statute of limitations.

The Petition for a Writ of Certiorari should not be granted in this case because the issue on which the Petitioner seeks review is not properly justiciable by this Court. It is a well-established doctrine of this Court that the Court will not issue advisory opinions, but will resolve cases only on direct, outcome-determinative questions. *See, e.g., United Public Workers of American (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) ("[T]he federal courts . . . do not render advisory opinions"). When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. *See Muskrat v. United States*, 219 U.S. 346 (1911). However, the rule against advisory opinions also recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question

emerges *precisely framed* and *necessary for decision* from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." *United States v. Fruehauf*, 365 U.S. 146 (1961) (emphasis added). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process. *See*, *Flast v. Cohen*, 392 U.S. 83 (1968). The question presented by the Petitioner is neither "precisely framed" nor "necessary for decision" and, thus calls for an advisory opinion.[1] Accordingly, the Petition in this case should be denied.

Although barely mentioned in the Petition, *the* dispositive question in this case is not the question presented by the Petitioner, but the question of whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, applies to toll the statute of limitations and

---

[1] Even if the Court finds that the question presented by the Petitioner is arguably justiciable, this case is certainly not the "ideal vehicle" for resolving the question, as asserted by the Petitioner (Pet., p. 14) in light of the myriad factual complications and dispositive state law questions in the record. If the problem is indeed "frequently recurring," as also asserted by the Petitioner (Pet., p. 21), then it would certainly behoove the Court to preserve its exceedingly scarce resources until the question is presented in a cleaner record in the future.

"save" Petitioner's otherwise time-barred claim(s) against the Respondents in their individual capacities. Pet. 3a, 6a (the Eighth Circuit Court of Appeals summarized the individual capacity claim(s) against the Respondents by stating that "unless tolled, the individual capacity claims are time-barred" and ultimately held that "the one-year savings statute did not apply, and these claims [against Respondents in their individual capacities] were properly dismissed as time-barred"). This question is substantially different from the question presented by the Petitioner because the Petitioner's question ignores the fact that the Respondents, in their individual capacities, never *actually* filed an Answer (or other responsive pleading) to the Complaint in the original action and therefore were never *actually* made parties in the first case. In the end, the Petitioner's question – whether Petitioner's Complaint *should have been* construed (several years after its filing) to have named[2] the Respondents in their individual capacities in the original action – is not outcome-determinative and, thus, does not warrant a grant of certiorari.

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[2] Of course, naming an individual as a defendant in a civil complaint in Arkansas (which involves merely typing his name or a pseudonym onto a document filed with a court, subjecting him to nothing) is quite different and legally distinct from that individual actually becoming a party (which generally involves proper service and the filing of a responsive pleading, subjecting him to the jurisdiction of the court and, depending upon the nature of the case, unlimited liability). *See generally,* Ark. R. Civ. Proc.

The procedural history of this suit involves two separate Complaints (referred to herein as the "original" Complaint and the "second" Complaint), both asserting allegations arising from incidents that allegedly occurred in mid-August, 2002. The second Complaint, which clearly and unambiguously named Respondents Eric Chisom and Marcie Bruner in their individual capacities, was not filed until September 22, 2005, well over three (3) years after the alleged occurrence and well beyond the applicable statute of limitations. *See* Pet. App. 2a (citing *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991); *see also Wilson v. Garcia*, 471 U.S. 261 (1985); *Owens v. Okure*, 488 U.S. 235 (1989). Accordingly, Respondents Chisom and Bruner, in their individual capacities, moved for summary judgment on the basis that the claims against them were time-barred. The District Court for the Eastern District Court of Arkansas granted the Respondent's motion for summary judgment (Pet. App. 15a-26a) and the Eighth Circuit Court of Appeals affirmed (Pet. App. 1a-14a).

In an attempt to avoid the result reached by the District Court and the Court of Appeals, the Petitioner argues, if implicitly, that the "Arkansas Savings Statute," Ark. Code Ann., should have applied to toll the applicable statute of limitations.

At the outset, it should be noted that Petitioner's argument that the savings statute should apply presents, at best, a disputed question of state law, *see, e.g., Bush v. Gore*, 531 U.S. 98, 123 (2000) (dis. opn. of Stevens, J.) ("[w]hen questions arise

about the meaning of state laws . . . it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers"), and Arkansas' highest courts have held, in an analogous line of cases, that *actual* (rather than *constructive*) party status is required to trigger the Arkansas Savings Statute and its tolling effect. In those intriguingly analogous cases, the Arkansas Supreme Court and the Arkansas Court of Appeals uniformly held that a decedent's children and other heirs and beneficiaries of her estate, despite being *constructive* or "real parties in interest," could not avail themselves of the tolling effect of the "Arkansas Savings Statute" after the death of the administrator of the estate (where the administrator was the named Plaintiff in the first case and died beyond the expiration of the applicable limitations period) because they were not actual parties to the first lawsuit. *Murrell v. Springdale Memorial Hosp.*, 330 Ark. 121, 125-126, 952 S.W.2d 153, 156 (1997); *Sanderson v. McCollum*, 82 Ark. App. 111, 117, 112 S.W.3d 363, 366 (Ark. App. 2003) (citing *Murrell*); *see also Tatus v. Hayes*, 79 Ark. App. 371, 88 S.W.3d 864 (2002) & *Smith v. St. Paul Fire & Marine Ins. Co.*, 76 Ark. App. 264, 269, 64 S.W.3d 764, 768 (2001) (Savings Statute also inapplicable where heirs were Plaintiffs in first suit and administratrix was Plaintiff in second suit). The Eighth Circuit Court of Appeals has held similarly, albeit with regard to claims rather than parties, when it held that the Arkansas Savings Statute applies only as long as the second cause of action is "the same in substance[, rather than form,] as the

[original complaint] at the time the latter was non-suited." *Dillaha v. Yamaha Motor Corp., U.S.A.*, 23 F.3d 1376, 1377 (8th Cir. 1994) (citing *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 994 (8th Cir. 1989)) (second bracketed phrase in original). In the end, the appropriate and dispositive inquiry, under Arkansas law, is not whether the Respondents, in their indivual capacities, *should have been deemed to be* named in the original action, but whether they *actually were* parties to the original action. Since they undoubtebly were not, a grant of certiorari in this case is not warranted.

In its opinion, the Eighth Circuit Court of Appeals concurrently analyzed the questions of the *constructive* and *actual* party status of the Respondents, in their individual capacities. With regard to the Respondents' actual party status, the Court of Appeals noted that all of the defendants other than the Respondents (including ten other defendants, who unlike the Respondents, *were* specifically and expressly named in their individual capacities in the caption of the first case Complaint) filed an Answer in the first case "in both their individual and official capacities." Pet. App. 4a. Conversely, the Court of Appeals noted that the Respondents filed separate Answers, "but only in their official capacities." *Id.*[3]

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[3] Although not noted by the Court of Appeals, neither the Petitioner nor the District Court, *sua sponte*, ever moved for or even mentioned default judgment during the 16 months of

(Continued on following page)

"Some months later," after ample time to amend, the defendants in the first case, including the Respondents in their official capacities, moved for summary judgment and argued, in part, that the Respondents were sued only in their official capacities. Pet. App. 4a, 18a. The Petitioner thereafter responded to the summary judgment motion, but offered no rebuttal, in proof or argument, to the Respondent's argument that they had not sued only in their individual capacities. *Id.*

In the end, the Respondents were not named as defendants in the original action in their individual capacities, therefore, they did not respond to the original complaint in their individual capacities. The tolling effect of the "Arkansas Savings Statute" does not apply to "save" an otherwise time-barred claim unless the party sued in the second action was actually made a party to the original action. Accordingly, since the Respondents were never actually made a party to the original action, the time-barred claim(s) against them in their individual capacities in this lawsuit are subject to dismissal, as held by the district court and the court of appeals. As such, certiorari should be denied.

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litigation in the first case, the expected response when a defendant fails to answer a complaint.

II. The Petitioner's arguments fail because, even under the course of proceedings test urged by the Petitioner, the "Arkansas Savings Statute" would still not apply to toll the statute of limitations and the Petitioner claim(s) against the Respondents would therefore still be time-barred.

In addition to the non-dispositive nature of the Petitioner's presented question, this case is also unworthy of review because the Petitioner cannot satisfy even the more lenient "course of proceedings" tests he advocates in his Petition. Petitioner argues, of course, that he can satisfy the course of proceedings test based upon several phrases in his Complaint and upon several pleadings filed by the defendants below. In highly revelatory omissions, however, the Petition fails to note (1) that the caption of the Petitioner's initial complaint specifically and expressly named ten (10) other defendants in their individual capacities, but failed to name the Respondents in their individual capacities and (2) that the Respondents never responded to the Petitioner's initial complaint, by Answer or other responsive pleading, in their individual capacities. Petitioner also fails to note that, despite the fact that the Respondents never filed an Answer in their individual capacities in the first suit, Petitioner never moved for default judgment. The district court likewise never even mentioned the issuance of a default judgment *sua sponte*.

In addition to the omissions in his narrative, Petitioner's "course of proceedings" examples also fail.

First, Petitioner argues that he named that Respondents "as individual Defendants" in the body of his complaint in the original action. This argument, however, ignores the course of the proceedings it purports to embrace. In addition to the fact that it entirely contradicts the caption of the complaint, it is also belied by the Petitioner's own conduct in the original action. *See supra* (Petitioner never moved for default judgment and failed to offer any rebutting proof or argument to the Respondents' summary judgment assertion that they were named only in their official capacity). Furthermore, the referenced clause in the Petitioner's Complaint is both "ambiguous" and "cryptic" and certainly failed to place the Respondents on notice of potential personal liability.

The Petitioner also argues that, because he sought punitive damages in his original complaint and because punitive damages are not generally recoverable against local governmental entities, his complaint must have been against the Respondents in their individual capacities. Pet., p. 15. Petitioner likewise argues that, because he alleged joint and several liability in his original complaint and because joint and several liability makes "no sense" as against multiple official capacity defendants who are employees of the same local governmental entity, since such claims are legally duplicative.[4] *Id.* These arguments

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[4] Petitioner's argument regarding his joint and several liability claim is, at best, disingenuous. Petitioner now concedes (in a new attempt to further his course of proceedings argument)

(Continued on following page)

fail, however, because the referenced punitive damages and joint and several liability allegations were made against the "Defendants" generally, which included ten (10) other defendants who were (unlike the Respondents) specifically and expressly named in their individual capacities in the original complaint. Pet. App. 35a. As such, neither allegation, even under a course of proceedings analysis, indicates an intent to sue the Respondents in their individual capacities (as they might have, for instance, if the Respondents had been the only defendants).

In addition to specific excerpts from the original complaint, Petitioner asserts that the allegations of the original complaint were "grounded" in "individual wrongdoing" rather than "ministerial implementation of a municipal custom or policy that would underlie an official-capacity claim." Pet., p. 16. Petitioner's

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that official capacity claims against officials and employees of the same local governmental entity are the same claim, such that it would make "no sense" to pursue multiple official capacity claims against officials and employees of the same local governmental entity (despite the fact that Petitioner did just that in both of the underlying cases). Pet., p. 15. In the second case below, however, subsequent to and despite the District Court's outright dismissal of at least ten (10) other official capacity claims against Drew County in the original action, the Petitioner filed and vigorously pursued the same official capacity claims against the Respondents. Petitioner's previous argument (in direct contradiction to his current argument) on this point imposed substantial costs on both the parties and the courts below. At the very least, Petitioner should not now benefit from his opportunistic about-face.

argument on this point, however, is contradicted by the express language of the original complaint, in which Petitioner, after alleging the purported facts of the case, asserted that "[t]hese acts, omission, and conduct *constitute* official policies, practice or customs of the defendants, Drew County and Drew County Sheriff, LaRon Meeks." Pet. App. 34a, ¶18 (emphasis added).

In addition to the original complaint, the Petitioner also discusses two events in the "course of proceedings" in the original action that purportedly "confirm[ed] that respondents understood that they had been sued in both their official and their individual capacities." First, Petitioner cites to a motion for extension of time filed by the undersigned counsel on behalf of the Respondents "in both their official and their individual capacities." This motion, however, clearly stated that undersigned counsel had "agreed to defend" only "certain of the Defendants in this action." Pet. App. 36a. Undersigned counsel did not agree to defend the Respondents in their individual capacities until several years later when he filed an Answer on their behalf in the second action. Furthermore, the Respondents did not subsequently answer or otherwise respond to Petitioner's Complaint and were never actually made defendants in the original action in their individual capacities. Petitioner also asserts that, because the defendants in the original action asserted the defense of qualified immunity, in their Answers and in their motion for summary judgment, they must have understood

the complaint to be made against them in their individual capacities. This is incorrect. With regard to the summary judgment motion, qualified immunity was asserted collectively for all defendants, including ten (10) other defendants who were (unlike the Respondents) specifically and expressly named in their individual capacities in the original complaint. With regard to the Answers, Petitioner fails to note that those Answers were expressly filed by the Respondents only in their official capacities. Pet. App. 39a-46a.

In the end, this case is far from the "ideal vehicle" for resolution of Petitioner's question, in part, because even if the Court accepted the course of proceedings test, the result in this case would not change. Accordingly, the Respondents respectfully request the denial of the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

JOSHUA D. BAKER,
Petitioner,

v.

ERIC CHISOM, DREW COUNTY DEPUTY SHERIFF, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, AND MARCIA BRUNER, DREW COUNTY DEPUTY SHERIFF, IN HER OFFICIAL AND INDIVIDUAL CAPACITIES.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONER

This Court has previously recognized the long-standing split among the circuits over whether a civil rights complaint will be construed solely as an official-capacity suit unless the defendant is expressly named in his "personal capacity." *Hafer v. Melo*, 502 U.S. 21, 24 n.* (1991). That conflict now encompasses three distinct and irreconcilable rules applied by twelve different courts of appeals. *See* Pet. 8-14. The Eighth Circuit categorically holds that such an express statement is required, even when (as in this case) the course of the proceedings in the lawsuit establishes the plaintiff's intent to name the defendant in his individual capacity as well. The judgment in this case turns solely on the correctness of that per se rule, to which the Eighth Circuit is completely committed in light of its consistent precedent spanning more than a decade capped by the denial of rehearing en banc over a dissent in this case (Pet. App. 28a-29a), and despite the court's repeated recognition (*id.* 11a-12a (concurring opinion); *e.g.*, *Murphy v. Arkansas*, 127 F.3d 750, 755 (8th Cir. 1997)) that every other court of appeals rejects its "formalistic 'bright-line' test" (*Powell v. Alexander*, 391 F.3d 1, 22 (1st Cir. 2004)).

Though they neither deny the circuit conflict, nor defend the merits of the Eighth Circuit's wholly isolated position,. respondents seek to evade any liability for a vicious assault on petitioner that was captured on videotape and resulted in a criminal conviction. As the petition explains (at 23-24), the holding of the Eighth Circuit that mandated the dismissal of petitioner's civil rights complaint cannot be recon-

ciled with this Court's precedents, which make clear that even when plaintiffs do "not expressly allege at the outset of . . . litigation that they were suing [a defendant] in his official capacity" (*Brandon v. Holt*, 469 U.S. 464, 469 (1985)), "[t]he course of proceedings . . . typically will indicate the nature of the liability sought to be imposed" (*Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). Moreover, unlike the Eighth Circuit's per se rule, this Court's "course of proceedings" test properly balances a defendant's interest in having "fair notice of what the plaintiff's claim is and the grounds upon which it rests" (*Conley v. Gibson*, 355 U.S. 41, 47 (1957)), with a plaintiff's interest in pursuing his claims without being thwarted by technical mistakes in pleading.

Respondents also do not dispute that the Eighth Circuit's holding functions principally as a trap for the unwary – the tens of thousands plaintiffs who file suit each year under 42 U.S.C. § 1983, many *pro se*. Given the difficulty that trained attorneys have navigating the nuanced distinctions between individual and official capacity suits, it is entirely unrealistic to expect that uncounseled plaintiffs will conform their pleadings to the Eighth Circuit's formalistic rule. Unquestionably, "[i]n many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both." *Kentucky v. Graham*, 473 U.S. 159, 167 (1985). *See* Pet. 19-20.

Because only this Court can bring uniformity to this important and recurring question of federal law

and correct the serious error of the Eighth Circuit's holding, certiorari should be granted.[1]

1. There is no merit to respondents' contention that the "dispositive question" in this case is "a disputed question of Arkansas law," which turns on "applicable state law and the facts of the case." BIO 4-5. Respondents' position seems to be that resolving the question of federal law decided by the lower courts and presented by the petition would amount to a prohibited "advisory opinion" (*id.* 6), because, as a matter of Arkansas law, the State's savings statute applies only if the original complaint expressly named the defendant in the same capacity as the later-filed suit.

Respondents' point is easily answered. The lower courts did not decide this case on the basis of the proper construction of the Arkansas savings statute. Rather, they decided, purely and exclusively as a matter of *federal* law, that petitioner's original complaint sued respondents only in their official capaci-

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[1] That the question presented arises frequently is demonstrated by the fact that, in only the short time since the petition was filed, courts outside the Eighth Circuit have repeatedly applied the "course of proceedings" test to determine that a defendant was sued in his individual capacity. *See, e.g., Lewis v. Williams*, Civ. No. 07-1592 (GEB), 2008 U.S. Dist. LEXIS 32870, at *11 (D.N.J. Apr. 22, 2008); *Brown v. Rector & Visitors of the University of Virginia*, No. 3:07cv00030, 2008 U.S. Dist. LEXIS 36427, at *8 n.3 (W.D. Va. May 2, 2008); *Short v. McKay*, 2:07-cv-00409, 2008 U.S. Dist. LEXIS 27323, at *10 (S.D. W. Va. Feb. 29, 2008); *Paffhausen v. Bay Country Library Sys.*, No. 06-13324-BC, 2008 U.S. Dist. LEXIS 33650, at *28-*31 (E.D. Mich. Apr. 24, 2008); *Baba-Singhri v. Cent. State U.*, No. 3:03cv429, 2008 U.S. Dist. LEXIS 18355, at *19-*20 (S.D. Ohio Mar. 10, 2008).

ties. Pet. App. 6a (court of appeals opinion: "[W]e agree with the district court that Baker's first complaint did not include the requisite clear statement that Chisom and Bruner were being sued in their individual capacities. Therefore, the one-year savings statute did not apply, and these claims were properly dismissed as time-barred."); *id.* 21a (district court opinion: "According to the Eighth Circuit's rule requiring an unambiguous statement to sue municipal officials in their individual capacities, the first action had to be treated as a suit against Bruner and Chisom in their official capacities only."). Despite respondents' attempt to suggest otherwise (BIO 8 (citing Pet. App. 3a, 6a)), the lower courts neither mentioned the state law question that respondents now contend is "dispositive" (*id.* 6) nor discussed any of the cases that respondents cite as "intriguingly analogous" (*id.* 10). *Accord* BIO 4 (recognizing that the district court actually held that respondents "were not sued in their individual capacities in the original action, that the tolling effect of the 'Arkansas Savings Statute' thus did not apply, and that Petitioner's claim(s) against the Respondents in their individual capacities should therefore be dismissed"). If certiorari were granted, this Court would decide only that federal law question, rather than the proper construction of the Arkansas savings statute, for the very reason that respondents give – namely, that this Court generally does not pass upon questions of state law.

To be sure, respondents are correct in their assertions (BIO 9-10) that petitioner's Section 1983 suit can proceed only if it was timely filed and that the

length of the limitations period is defined by Arkansas law. *Wilson v. Garcia*, 471 U.S. 261, 275 (1985); *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991). But that manifestly does not convert the question presented into "at best, a disputed question of state law." *Contra* BIO 9. If respondents were correct, then this Court would never decide any question regarding the statute of limitations under Section 1983, which always imports the analogous state law limitations period.

In any event, respondents' argument finds no basis in Arkansas law. Rather, respondents seek to extend cases such as *Murrell v. Springdale Mem'l Hosp.*, 952 S.W.2d 153 (Ark. 1997), and its progeny far beyond their actual holdings. In *Murrell*, for example, the Arkansas Supreme Court considered the timeliness of wrongful-death claims by the decedent's children when the original complaint, filed by their father (the decedent's widower), had been non-suited. The court's conclusion that "[t]he savings statute . . . cannot save their claims because the children were not parties to the first action" rested on the plain language of the savings statute, which "provides that if '*the plaintiff* therein suffers a nonsuit' then '*the plaintiff* may commence a new action within one (1) year.'" *Id.* at 156 (quoting 16-56-126 (emphasis in opinion)). Nothing in *Murrell* – or in the line of wrongful-death cases that followed it – deals at all with defendants or the circumstances in which a defendant named in

a complaint becomes a party to the action, much less the question presented by this case.[2]

Respondents moreover only glancingly invoked their state law argument before the court of appeals, notably citing *no* cases (much less any of the decisions they now regard as dispositive).[3] To the extent those passing references were sufficient to preserve the issue, respondents are free to raise it as an alternative ground for dismissal of the complaint on remand from this Court.

Because the "dispositive" question decided by the lower courts in this case unquestionably one of federal law, this case is an appropriate vehicle to decide the question presented.

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[2] *See also Sanderson v. McCollum*, 112 S.W.3d 363, 366 (Ark. App. 2003) ("[T]he savings statute cannot save a wrongful-death action when the current plaintiffs are not the same plaintiffs who were parties to first suit, which has been nonsuited."); *Tatus v. Hayes*, 88 S.W.3d 864, 866 (Ark App. 2002) (wrongful-death action brought by administratrix of decedent's estate was time-barred when prior wrongful-death action, which was nonsuited, was brought by decedent's heirs); *Smith v. St. Paul Fire & Marine Ins. Co.*, 64 S.W.3d 764, 769 (Ark. App. 2001) ("the savings statute is inapplicable because the plaintiffs differed between the first and second suits").

[3] *See* Resps. C.A. Br. 14 (noting in passing that "[i]n response to the Appellant's Complaint in the original action, Appellees Chisom and Bruner answered only in their official capacities and therefore were not parties to the original action in their individual capacities, as a matter of fact and law," but then explaining that "[i]n the end, the Appellant simply did not name the Appellees in their individual capacities in the original action and his claims against them in the instant case are therefore time-barred (since the Arkansas Savings Statue (sic) does not apply to toll the otherwise expired statute of limitations)" (footnote omitted)).

2. The petition demonstrated that the overwhelming majority of circuits would conclude that petitioner sued respondents in their individual capacities. Pet. 14-19. Respondents have no persuasive answer to that showing, and their assertion that this case is not an appropriate vehicle to resolve the recurring circuit conflict presented by the case lacks merit.

On three distinct grounds, other courts of appeals would easily conclude that the "course of proceedings" establish that petitioner filed an individual capacity claim. ***First***, petitioner's complaint seeks to hold respondents "jointly and severally" liable for, *inter alia*, punitive damages (Pet. App. 35a), which are available only against defendants sued in their individual capacities (*City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-60 (1981)). *See* Pet. 15 (citing, *e.g.*, *Powell v. Alexander*, 391 F.3d 1, 23 (1st Cir. 2004) (emphasizing that course of proceedings gave city official "fair notice that she was being sued in her individual capacity" because, inter alia, a "prayer for punitive damages could only be brought against defendant governmental officials who were sued in their individual capacities"). Respondents' answer that petitioner sought punitive damages "against the 'Defendants' generally" (Br. 15) proves precisely petitioner's point (given that respondents are among the defendants) and in any event fails to account for petitioner's express request for joint and several liability. There is thus no explanation for the complaint's request for relief other than that petitioner named respondents as defendants in their individual capacities.

Second, the gravamen of petitioner's complaint against respondents is their personal wrongdoing, as distinct from the implementation of a municipal custom or policy that would give rise to official capacity liability. *See* Pet. 16 (citing, *e.g.*, *Biggs v. Meadows*, 66 F.3d 56, 61 (4th Cir. 1995) (in finding that plaintiff "intended to sue the defendants as individuals," explaining that plaintiff's allegations "focus on [defendants'] actions toward Biggs and do not necessarily implicate an official policy or custom")). Respondents point to the complaint's statement that "these acts, omissions, and conduct constitute official policies, practice or customs of the defendants." BIO 16 (quoting Pet. App. 34a). That argument is misguided. The actual *assault* for which petitioner seeks to hold respondents liable obviously is not a municipal policy, practice, or custom. The language cited by respondents instead relates to the complaint's distinct allegations that certain of the defendants "refused to or did not adequately supervise the operation of the jail and the deputy sheriffs employed by them" and "permit[ted] or fail[ed] to take the steps necessary to prevent the bodily assault." Pet. App. 33a-34a.

Third, respondents themselves recognized that petitioners had sued them in their individual capacity. *See* Pet. 17 (citing, *e.g.*, *Moore v. City of Harriman*, 272 F.3d 769, 772 n.1 (6th Cir. 2001)). Respondents specifically and expressly sought an extension of time to respond to the complaint "in both their individual and official capacities." Pet. App. 36a. Respondents' counsel now asserts that he actually "did not agree to defend the Respondents in their individ-

ual capacities until several years later." BIO 18. Although the motion speaks for itself and indicates the opposite, the precise nature of respondents' retainer agreement with their lawyer is immaterial. The relevant point is that their motion demonstrates that at the time they understood petitioner's complaint to state an individual capacity claim.

All the defendants, including respondents, also asserted the defense of qualified immunity, which applies only to individual capacity claims. *See* Pet. 17 (citing, *e.g.*, *Biggs*, 66 F.3d at 61 ("Because qualified immunity is available only in a personal capacity suit, the assertion of that defense indicates that the defendant interpreted the plaintiff's action as being against him personally." (citation omitted))). Respondents now note that "qualified immunity was asserted collectively for all defendants" (Br. 17), but that is of course precisely petitioner's point. They drew no distinction between respondents and the remaining defendants. Pet. 16-17.[4]

Respondents' argument that other facts show that they were sued only in their official capacities is unpersuasive. Principally, respondents rely on the "caption of the complaint." BIO 14. But the caption said *nothing* about the capacity in which *respondents* were sued. *See* Pet. 30a. If petitioner's complaint had named respondents only in their "official capacity," that would be a strong argument; the apparently conscious choice to omit an individual capacity claim would be telling. But the fact that the complaint spe-

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[4] Petitioner's complaint also expressly states that respondents are named "as individual Defendants." Pet. App. 31a. *See* Pet. 4, 15.

cified that some other defendants were being sued in two separate capacities, individual and official (*see id.*),[5] does nothing to support an inference that respondents were sued in only one, and that one was their official capacity. Even respondents agree that petitioner must have intended to sue them in *some* capacity despite the complaint's silence on that score. And respondents have no explanation for why the correct inference is that petitioner sued them in their "official" rather than their "individual" capacity.

In any event, there is a perfectly logical explanation for why the complaint specified the dual capacities of the remaining defendants, and that explanation overcomes the persuasive force of the indirect inference that respondents ask this Court to draw. As noted *supra*, among all the defendants, respondents were the individuals who were actually involved in the assault on petitioner that gave rise to his lawsuit. The remaining defendants were municipal officials who were not directly involved in the attack. If petitioner had not specified in his complaint that the municipal officials were sued in their individual capacities, a court might have concluded that petitioner sought to hold them liable only as government officials for implementing a municipal policy. *See* Pet. 18.

Respondents also hope to suggest that petitioner recognized that he had sued them only in their official capacities. Most telling, of course, is the undis-

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[5] Respondents' assertion that this fact is a "highly revelatory omission" from the petition (BIO 13) of course fails to recognize that the petition discusses the issue repeatedly (*see, e.g.*, Pet. 4, 18).

puted fact that petitioner has always maintained the contrary. Citing the district court's opinion, respondents nonetheless allege that, in moving to dismiss petitioner's original complaint with prejudice, they had argued "that the Petitioner had sued the Respondents only in their official capacities," and that "[t]he petitioner failed to offer any rebuttal" to that argument. BIO 3 (citing Pet. App. 18a). That is inaccurate. The district court's opinion explains that, in fact, respondents argued that they "were only sued in their official capacities since the complaint did not unambiguously state that they were sued in their individual capacities" as required by Eighth Circuit precedent. Pet. App. 18a. There was of course no possible "rebuttal" (BIO 3) to that conclusion, because it merely employs the Eighth Circuit's myopic, categorical rule requiring an explicit statement that the defendant be named in his individual capacity. *See* Pet. App. 21a (under "the Eighth Circuit's rule requiring an unambiguous statement to sue municipal officials in their individual capacities, the first action had to be treated as a suit against Bruner and Chisom in their official capacities only").[6]

Nor, finally, do respondents dispute that the Ninth Circuit – which presumes that civil rights defendants are named in their individual capacity – would have reached the opposite result from the Eighth Circuit

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[6] Respondents place far too much weight (BIO 14) on the isolated fact that petitioner did not file a motion seeking a "default judgment" on the ground that they had answered the complaint only in their official capacities. Such a motion would have been a futile exercise: even if the district court viewed it as meritorious, respondents would merely have amended their answer.

in this case. *See* Pet. 13 (citing *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1990), *cert. denied*, 502 U.S. 967 (1991)).

Because other courts of appeals would have held on the basis of the course of proceedings or a presumption that would not have been overcome on the facts of this case that petitioner's complaint states an individual capacity suit against respondents, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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